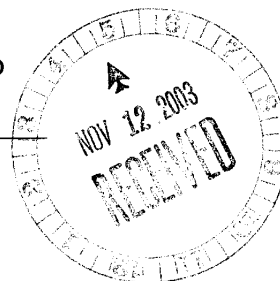


209393

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34319



CONSOLIDATED RAIL CORPORATION --
DECLARATORY ORDER PROCEEDING

AT&T COMMUNICATIONS, INC.'S REPLY TO
CONSOLIDATED RAIL CORPORATIONS OPENING EVIDENCE AND ARGUMENT

Lois J. Lipton, Esq.
AT&T LAW DIVISION
222 W. Adams Street, Suite 1500
Chicago, IL 60606
Telephone: (312) 230-2667
Facsimile: (312) 977-9511

ENTERED
Office of Proceedings

NOV 13 2003

Part of
Public Record

Robert J. Higgins, Esq.
Howard N. Feldman, Esq.
B. Haven Walling, Jr., Esq.
Laura H. Hamilton, Esq.
DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
Telephone: (202) 785-9700
Facsimile: (202) 887-0689

Paul H. Lamboley, Esq.
1701 Pennsylvania Avenue
Suite 300
Washington, D.C. 20006
Telephone: (202) 879-2623
Facsimile: (202) 879-2624

Attorneys for AT&T Communications, Inc.

TABLE OF CONTENTS

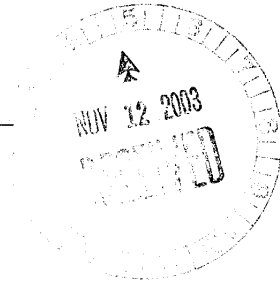
	<u>Page</u>
Introduction.....	2
Summary Of Argument.....	5
Critical Factual Framework Of Decision No. 89	7
A. The Transaction Approved By The Board Was A Voluntary Private-Sector Initiative by Conrail, CSX and NS	7
B. Key Terms of the Transaction Belie Conrail's Claims	8
1. The Relationships Created by the Transaction	8
2. Conrail's Retention of the License Agreement.....	10
C. Conrail's Post-June 1, 1999 Treatment of the AT&T License Agreement.....	13
Argument	15
I. The "Necessity" Standard Under 49 U.S.C. § 11321(a)	15
II. Conrail Has Failed To Meet Its Burden Under The Necessity Test.....	19
A. As The District Court Recognized, Conrail's First Question Is A Red Herring.....	19
B. Conrail Has Not Demonstrated That It Should Be Exempt From Liability Under the MFN Covenant for Post June 1, 1999 Contracts Entered into by CSX/NYC and NS/PRR.....	22
C. Conrail Has Made No Showing That The Transfer Of Its Right Of Way Has Rendered Its Compliance With The MFN Covenant Commercially Impracticable.....	24
III. Effect Of Conrail's Petition For Supplemental Order (Sub-No. 94)	26
Prayer For Relief.....	26

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34319

CONSOLIDATED RAIL CORPORATION --
DECLARATORY ORDER PROCEEDING

AT&T COMMUNICATIONS, INC.'S REPLY TO
CONSOLIDATED RAIL CORPORATIONS OPENING EVIDENCE AND ARGUMENT



INTRODUCTION

This dispute has absolutely nothing to do with the federal regulation of railroad transportation. It involves only a commercial contract dispute over the amount of money AT&T is obligated to pay Conrail under an agreement giving it the right to install, use and maintain an underground fiber optic cable system within the railroad right of way.

Nearly 20 years ago, in 1984, AT&T and Conrail entered into a long-term License Agreement in which AT&T agreed to pay Conrail millions of dollars to use portions of Conrail's railroad right of way for a fiber optic cable system. In exchange, AT&T bargained for Conrail's promise that AT&T would pay Conrail no more for the use of the right of way than Conrail obtained from AT&T's telecommunications competitors (the "MFN Covenant"). Under the MFN Covenant, if a competitor was charged lower fees, AT&T's fees would be adjusted accordingly.

In 2001, AT&T learned that, despite its representations to the contrary, Conrail had not honored the MFN Covenant. Thereafter, AT&T filed a breach of contract complaint, alleging, among other things, that Conrail improperly had refused to give AT&T any information about license agreements with AT&T's competitors that may have been entered into after the

June 1, 1999 effective date of the CSX/NS/Conrail control transaction (the “Transaction”) that this Board approved in CSX Corp. et al. – Control and Operating Leases/Agreements – Conrail Inc., et al., 3 S.T.B. 109 (1998) (Decision No. 89). AT&T alleged that Conrail had breached the MFN Covenant by disavowing any responsibility to reduce AT&T’s fees even if AT&T’s competitors were charged lower fees in any post-Transaction license agreements (which Conrail claimed it had the right to do because it claimed it had no control over the transferred right of way and no authority over the terms of any such agreements).

Conrail filed a motion before the District Court to dismiss that portion of AT&T’s complaint for lack of subject matter jurisdiction and a petition before this Board for institution of a declaratory order proceeding. The fundamental premise of Conrail’s motion and STB petition, is that that part of AT&T’s complaint constitutes an attack on Decision No. 89 – and this Board’s continued ability to implement the Transaction – because any judgment against Conrail requiring Conrail to honor the MFN Covenant as it relates to post-Transaction contracts would interfere with the division of assets that is at the heart of the Transaction.

The District Court flatly rejected Conrail’s assertions that *any* of AT&T’s claims constitute an attack on the Transaction. *Memorandum Opinion and Order* (attached hereto as Exhibit 1 (“Ex. 1”) at 17. Recognizing that “the only relief AT&T seeks is a reduction in fees as mandated by the MFN” Covenant, the Court ruled that AT&T’s allegations “do not directly implicate the Transaction, nor do they purport to create any direct obstacle to the implementation of the Transaction.” Ex. 1 at 18. On these findings, the Court concluded that “Conrail has failed to persuade the Court that the issues presented by its contractual dispute with AT&T so clearly threaten the Transaction or the STB’s ability to effectively manage similar transactions that it is within the STB’s *exclusive* jurisdiction to resolve.” *Id.* at 17. The Court therefore denied Conrail’s motion to dismiss for lack of subject matter jurisdiction. However, in deference to the

Board's expertise, the Court granted Conrail's motion to refer Conrail's questions to the Board.
Ex. 1 at 21.

SUMMARY OF ARGUMENT

As the District Court recognized, Conrail's argument that it is exempted from some of its MFN obligations to AT&T is based upon "paint[ing] itself as a victim of STB-imposed circumstance, left with no choice but to continue to accept AT&T's license fees, while remaining unable to honor its obligations under the MFN." *Id.* at 16. When light is shed on Conrail's claims and their factual underpinning, it is clear that its insistence on full payment from AT&T while refusing to fully perform its promises, has no basis in the License Agreement and is not justified by the Transaction. For this reason, the answer to each question that Conrail posits is a resounding "No."

Question No. 1: Whether Decision No. 89 preempts any claim that Conrail breached the MFN clause in the License Agreement by "disabling itself of the ability to perform its obligations" under the MFN clause after June 1, 1999.

This question is based upon Conrail's inaccurate characterization of AT&T's complaint that "AT&T essentially alleges that Conrail should be held liable for entering into a Transaction Agreement that removed Conrail's dominion over most of its former system." *Conrail Mem.* at 4. This question is a red herring. As the District Court found, AT&T does not in any way seek to challenge Conrail's entry into the Transaction or its transfer of right of way that is subject to AT&T's License Agreement. Indeed, it was Conrail that insisted on maintaining its rights under the License Agreement. AT&T merely seeks to hold Conrail to its continuing obligations under that retained Agreement. Thus, the first question must be rejected (or answered "No") because it is based upon a false premise.

Question No. 2: Whether Decision No. 89 preempts any claim against Conrail arising from the application of the MFN Covenant to fiber optic contracts separately entered into by CSX/NYC and NS/PRR, including

any subsidiaries of those entities, regarding former Conrail lines after the June 1, 1999.

This question goes to the nub of Conrail's claim that its post-June 1, 1999 MFN obligations to AT&T are preempted. Conrail's contention that it cannot comply with the MFN Covenant because by virtue of Decision No. 89, it no longer controls the right of way subject to AT&T's License Agreement and has no control over or even knowledge about the agreements that may have been entered into after June 1, 1999 is squarely refuted by the express terms of the Transaction. Simply put, the Transaction Agreement approved by the Board provides that Conrail would retain the License Agreement, with all its benefits *and burdens*, and it requires the parties to cooperate and take whatever steps were required to ensure that Conrail could continue to comply with its License Agreement obligations. Thus, Conrail's assertions that holding it liable for contracts entered into after it transferred the right of way would impede the right of its related entities to independently negotiate again fiber optic agreements on their right of way assumes a proposition that is not supported by the Transaction Agreement. In implementing that agreement, those related entities took the right of way subject to AT&T's rights. Moreover, enforcing AT&T's rights would not prevent CSX, NS or any related entity from entering into whatever fiber optic license agreements they see fit regarding the transferred right of way.

Question No. 3: Whether Decision No. 89 preempts any claim against Conrail arising from the application of the MFN clause in the FOC License Agreement insofar as the ownership and operation of former Conrail right of way by CSX/NYC and NS/PRR after the Split Date renders Conrail's compliance with that clause commercially impossible or impracticable.

Here, Conrail contends that because it no longer needs telecommunications services from Qwest Communications ("Qwest") – it asserts as a result of the Transaction – it should have no obligation to AT&T to reduce any post-June 1, 1999 fees AT&T has paid or will pay to the extent that it is not requiring Qwest to provide quid pro quo for Qwest's use of the right of way. But Conrail's reduced need has nothing to do with its obligation to comply with the MFN

provision and certainly does not make it commercially impractical or impossible. The fee arrangement it entered into with Qwest in 1996 apparently was based upon Conrail's speculation about its need for future telecom services and therefore necessarily reflected the risk that Qwest's costs for providing these services would be less than the fees Conrail charged to AT&T. There is nothing impossible about Conrail reducing AT&T's fees. Moreover, when Conrail chose to retain the AT&T License Agreement it was in an excellent position to foresee that it would not need the Qwest capacity and make arrangements accordingly. There is nothing to prevent Conrail's successors to the right of way from using the Qwest capacity - indeed, the Transaction Agreement expressly contemplates that possibility - and those successors have an obligation to cooperate with Conrail to ensure its compliance with the MFN Covenant.

CRITICAL FACTUAL FRAMEWORK OF DECISION NO. 89

To shore up its preemption claim, Conrail glosses over or ignores key terms of the Transaction. Those omitted provisions make clear that Conrail's defenses are baseless, and Conrail's efforts to use the transfers as an excuse to breach the MFN Covenant," *see id.* at 18, must be rejected.

A. The Transaction Approved By The Board Was A Voluntary Private-Sector Initiative by Conrail, CSX and NS

First, while perhaps obvious, it is worth noting that, contrary to Conrail's representations to the District Court, it *voluntarily* entered into the June 10, 1997 Transaction Agreement ("Transaction Agreement") with CSX and NS.¹ The Board approved the Transaction

¹ Conrail told the District Court that it "was compelled," or "was ordered" to transfer 90% of its property to entities "created by the Board." *Hearing Transcript ("H.T.")* (attached hereto as Exhibit 2) at pp. 7, 9, and 15. *See also H.T.* at 16 (where Conrail represented that the Transaction "was basically a hostile takeover that ended up with the Board figuring out how to do it"); and 64 (where Conrail stated "And in fact that was part of the delicate balance that the Board decided who got what to keep them all together and to keep Conrail as the insulating entity between these two highly competitive railroads that were trying to become, in the Board's view, an anti-competitive influence in the Northeast.") Not surprisingly, in this forum Conrail (footnote continued on next page)

(with some modifications not pertinent here) as presented in an application jointly submitted by Conrail, CSX and NS. Indeed, recognizing that “[t]here is a strong public interest in encouraging private parties to negotiate procompetitive transactions such as this one,” in Decision No. 89, the Board “recogniz[ed] the operational and competitive integrity of the proposal [submitted by CSX, NS and Conrail] and the importance of preserving and promoting privately negotiated agreements.” Decision No. 89 at 186 (Comments of Chairman Morgan).

B. Key Terms of the Transaction Belie Conrail’s Claims

In order to claim “lack of control” after June 1, 1999, Conrail studiously ignores the interrelationships of the parties created by the Transaction Agreement, as well as its terms relating to Conrail’s retention of the License Agreement, including establishment of a framework for ensuring that Conrail would be able to honor its obligations to its licensees (like AT&T) as necessary so it could continue to reap the large fees paid by those licensees. These indisputable provisions squarely refute Conrail’s repeated assertions that it has been stripped of all ability to exercise any control over, or even acquire knowledge about the terms of fiber optic licenses on the transferred right of way entered into after June 1, 1999.

1. The Relationships Created by the Transaction

In the Transaction, Conrail was acquired by CSX Corporation (“CSX”) and Norfolk Southern Corporation (“NS”). CSX and NS are Conrail’s sole shareholders (through a newly-created holding company and two intermediate subsidiaries not pertinent here), and each has an equal voting interest in Conrail. CSX and NS appoint Conrail’s Board of Directors, and Conrail holds its retained assets, including the AT&T License Agreement, for their exclusive benefit.

See Decision No. 89 at 23, 24.

appears to have abandoned the contention that it was coerced by the Board to transfer its right of way. Nor does Conrail urge “revenue needs” in light of the “keep well” provisions of Section 4.3 of the License Agreement, which Conrail relied upon in Sub-No. 94.

To effect the division of Conrail's assets, Conrail formed two wholly-owned subsidiaries, New York Central Lines, LLC ("NYC") and Pennsylvania Lines, LLC ("PRR"). CSX appoints the directors of NYC, and NS appoints the directors of the PRR. Conrail is the sole governing member of NYC and PRR but in managing them, it is required to follow the directions of CSX and NS, respectively. Decision No. 89 at 24; Transaction Agreement (Conrail Exhibit 1) at Sect. 5.1 and Sect. 5.2.

NYC has entered into an operating agreement with CSX Transportation, Inc. ("CSXT"), a wholly-owned subsidiary of CSX, and PRR has entered into an operating agreement with Norfolk Southern Railway Company ("NSR"), a wholly-owned subsidiary of NS. *See* Operating Agreement by and between New York Central Lines LLC, as Owner, and CSX Transportation, Inc., as Operator (attached hereto as Exhibit 3); Operating Agreement by and between Pennsylvania Lines Lines LLC, as Owner, and Norfolk Southern Railway Company, as Operator (attached hereto as Exhibit 4). These operating agreements allow CSXT and NSR to use the right of way that Conrail transferred to NYC and PRR. In connection with that use, CSXT and NSR are permitted to enter into new fiber optic agreements with AT&T's competitors, but *only if* they secure the prior written approval of NYC and PRR (which are managed by Conrail as directed by CSX and NS). *See* Ex. 3 at Sects. 2.1, 12.1; Ex. 4 at Sects. 2.1, 12.1.²

The parties told the Board that Conrail's operations would be funded by payments made by CXST and NSR in connection with the assets allocated to NYC and PRR and that if these payments proved insufficient to allow Conrail to satisfy its obligations, CSX and NS

² Section 12.1 of each Operating Agreement provides in pertinent part: "Except as otherwise provided in this Agreement, the Operator [CXST or NSR] may not, without prior written consent of the Owner [NYC or PRR] . . . assign, transfer, sublease or otherwise grant the right to use any Allocated Asset or its interest therein or rights with respect thereto, including any Assigned Right."

would see that the necessary additional funds were provided. *See* Decision No. 89 at 33; Conrail Ex. 1 at Sect. 4.3.

2. Conrail's Retention of the License Agreement

According to the agreed-upon division of its assets, Conrail's holdings were divided into two categories, Allocated Assets and Retained Assets. October 10, 2003 Decision at 2-3. Approximately 90% of Conrail's railroad right of way became Allocated Assets that were transferred to either NYC or PRR. *Id.* at 3, n. 6.

Conrail concedes that it kept the AT&T License Agreement as one of its own Retained Assets. *Conrail Mem.* at 3. Nor can Conrail dispute that it retained the liabilities associated with the assets it retained, including the License Agreement. *See, e.g.,* Conrail Ex. 1 at Sect. 1.1 ("Liabilities"), and Sect. 2.8.

The parties to the Transaction Agreement contemplated that Conrail would continue to control the subject matter of the License Agreement and that NYC and PRR would ensure that Conrail could continue to meet its contractual obligations under the fiber optic license agreements it retained. Section 2.2(d) of the Transaction Agreement provides that, to the extent that any assets in which fiber optic cable rights have been given are allocated to NYC or PRR (here, the affected right of way), then NYC or PRR "will license or otherwise grant rights to [Conrail] *to maintain the subject matter of the contracts granting such rights.*" Conrail Ex.1 at Sect. 2.2(d).

The quitclaim deeds pursuant to which Conrail conveyed its right of way to NYC and PRR to effectuate the Transaction Agreement echo this intent. Conrail expressly reserved *to itself* all property rights under the AT&T License Agreement, and NYC and PRR explicitly recognized the need to honor the license agreement obligations. *See, e.g.,* Quitclaim Deed dated June 1, 1999 between Consolidated Rail Corporation and NYC, attached to hereto as Exhibit 5,

at pp. 1 and 2;³ Confirmatory Quitclaim Deed between Consolidated Rail Corporation and NYC, attached to hereto as Exhibit 6, at pp. 1 and 2.⁴ Indeed, the reservation in Exhibit 6 expressly gives Conrail an easement in the right of way to keep and maintain the existing fiber optic facilities and construct new ones – thereby effecting what the parties had agreed in the Transaction Agreement, that NYC or PRR would give Conrail whatever rights it needed “to maintain the subject matter” of the fiber optic agreements it kept as Retained Assets. *See* Section 2.2(d) of the Transaction Agreement.

Furthermore, in each of the quitclaim deeds, NYC and PRR expressly took the deeded right of way “SUBJECT TO . . . any agreements for location and use of fiber optic cable,

³ Exhibit 5 provides in pertinent part:

Grantor [Conrail] does hereby GRANT, RELEASE, REMISE and QUITCLAIM, unto Grantee [NYC] all right, title and interest of grantor whatsoever in and to certain portions of Grantor’s railroad rights-of-way and real property

EXCEPTING AND RESERVING unto Grantor all financial and property rights under that fiber optic agreement between Grantor and AT&T fiber optic company dated January 1, 1984

⁴ Exhibit 6 provides in pertinent part:

Grantor [Conrail] does by these presents RELEASE, REMISE and forever QUITCLAIM, unto Grantee [NYC], all right, title and interest of Grantor in and to certain portions of Grantor’s railroad rights-of-way and real property

RESERVING unto Grantor all right, title and interest in the Fiber Optic Agreement(s) mentioned below, including the right to collect all rents, profits, issues and fees therefrom, and the right(s), if any, to effect and renewals thereof, and rights in said renewals, and other rights and protections thereunder; AND EXCEPTING unto Grantor a nonexclusive easement to keep those existing fiber optic facilities in effect, and, under said Agreement(s), to install, construct, operate, repair, renew, replace therein and remove therefrom, such fiber optic communication facilities . . . as defined in said Agreement(s), and the right of access thereto; PROVIDED THAT such easement and rights shall be exercised in a manner which does not interfere with the railroad operations or safety of Grantee, or Grantee’s right to grant other such nonexclusive easements or licenses within the Premises.

conduit and related facilities in, on or along a portion of the Premises.” Ex. 5 at p. 2; Ex. 6 at p. 3. At a minimum, this requires that NYC and PRR will do what is necessary to avoid interfering with AT&T’s rights. For example, they would be required to ask Conrail where AT&T cable is buried so as to be sure not to cut or otherwise damage it. And since NYC and PRR are required by the operating agreements with CSXT and NSR to give their written consent to any agreement granting a third party the right to use the right of way formerly owned by Conrail, this would also mean that they should have to inform Conrail when they approve contracts that may implicate the MFN Covenant, so that Conrail can, if necessary, reduce its fees to AT&T to comply with that covenant.

Finally, the Transaction Agreement also provides that the parties will cooperate among themselves to effectuate all the transactions contemplated by the agreement:

Section 8.2. Best Efforts. Subject to the terms and conditions of this Agreement, each party agrees to use best efforts to take, or cause to be taken, all action, and to do, or cause to be done, all things reasonably necessary, proper or advisable under applicable laws and regulations to consummate and make effective the transactions contemplated by this Agreement and the Ancillary Agreements. No party shall knowingly take any action in contravention of, or which is inconsistent with, the transactions contemplated by this Agreement.

Conrail Ex. 1 at Sect. 8.2.

These provisions, among others, make clear that the parties to the Transaction did not intend for Conrail to walk away from any obligations under commercial agreements that did not pose any impediment to the transportation efficiencies that were intended to result from the proposed consolidation. Conrail’s conduct toward AT&T was consistent with the intention reflected in the Transaction Agreement that it would continue to fulfill its License Agreement obligations to AT&T. At no point during the STB approval process did Conrail notify AT&T that it believed that AT&T’s rights under the License Agreement would be compromised by any aspect of the Transaction. This is true even though (1) Conrail became aware in 1997 that

AT&T had elected to renew the License Agreement effective January 1, 1999, and (2) in connection with that renewal, in May 1998 (almost a year after the Transaction Agreement had been executed and while the STB approval process was still ongoing), Conrail proposed to AT&T that the MFN Covenant be eliminated from the “renewal license agreement.” *See* May 7, 1998 Letter from Conrail to AT&T, attached hereto as Exhibit 7, at pp. 1-2.⁵ Although the License Agreement was renewed with the MFN Covenant intact, Conrail is now improperly seeking self-help. Its efforts to evade its obligations while retaining all benefits should be rejected.

C. Conrail’s Post-June 1, 1999 Treatment of the AT&T License Agreement

AT&T continues to use portions of the right of way that Conrail has transferred to NYC and PRR subject to the License Agreement, and continues to pay *Conrail* – not NYC or PRR – some \$17 million annually in license fees for use of that right of way. Conrail does not claim that it can no longer give AT&T access to the right of way that it now claims it no longer controls, or that it can no longer give AT&T’s competitors with whom it has similar contracts, access to the same right of way. On the contrary, Conrail is the party that is liable to AT&T for fulfilling the terms of the License Agreement.

Conrail claims only that, after June 1, 1999, it is no longer bound by a single clause of the License Agreement – the MFN Covenant, pursuant to which Conrail promised that AT&T

⁵ Furthermore, Conrail’s hints that AT&T somehow sat on its rights during the STB approval proceeding, *Conrail Mem.* at 8, also must be rejected for the same reasons. There was absolutely nothing about the terms of the Transaction Agreement that should have put AT&T on notice that somehow its contractual rights under the License Agreement were going to be compromised. Conrail never suggested any such thing to AT&T and has continued to take AT&T’s money. Thus, there was no reason for AT&T to participate in the STB process. Indeed, if commercial contracts like the License Agreement are at risk under the STB approval process, then every commercial contract will be up for grabs. All manner of parties to ordinary commercial contract will necessarily have to appear before the STB to protect their interests. Simply stated, neither the STB’s procedures nor its precedent contemplate that non-transportation-related transactions are at risk and any other approach would contradict the purpose of the STB process.

would pay no more for the use of the right of way licensed from Conrail than its telecommunications competitors would pay for the use of that right of way.

Conrail now suggests that the MFN Covenant was just "[o]ne clause in the 58- page" agreement (*Conrail Mem.* at 5), and that the MFN Covenant was not "of the essence" of the License Agreement (*Conrail Mem.* at 6 n. 1). While AT&T does not expect the Board to accept Conrail's self-serving characterizations of this bargained-for term of the License Agreement, it is nonetheless worth noting that, by Conrail's reasoning, the *payment* terms of the License Agreement, which constitute a mere 3 paragraphs of that 58-page agreement (*see* Conrail Ex. 3 at ¶ 3), also would not be material to the parties' bargain. However, contrary to Conrail's effort to minimize the importance of the provision that benefited AT&T as opposed to Conrail, the District Court recognized, the license fees being paid by AT&T to Conrail were "inextricably intertwined" with the MFN Covenant. *H.T.* at 29-30. Parties bargain for MFN covenants in order to protect themselves from the disadvantage they would suffer if their competitors were charged lower fees for the same rights. *See, e.g., Carpenter Tech. Corp. v. Armco, Inc.*, 800 F. Supp. 215 (E.D.Pa. 1992), *quoting Prestole Corp. v. Tinnerman Products, Inc.*, 271 F.2d 146 (6th Cir. 1959) (enforcing an MFN covenant and recognizing that the "reasonable and proper objective" of an MFN clause is to protect a licensee "against a possible competitive disadvantage in the event of a license to a third party"). AT&T bargained for just such protection, and it cannot be taken away if Conrail's sole shareholders elect to approve license agreements entered into by Conrail-related entities that charge AT&T's competitors fees that are lower than those charged to AT&T.

ARGUMENT

I. THE "NECESSITY" STANDARD UNDER 49 U.S.C. § 11321(a)

As the Board recognized, all three questions posed by Conrail and the District Court boil down to the question whether the preemptive power of 49 U.S.C. § 11321(a) immunizes Conrail from its obligations to AT&T under the License Agreement to the extent the MFN Covenant would otherwise be implicated by the terms of any post-June 1, 1999 agreements. October 10, 2003 Decision at 1, 7. This requires a determination whether the exemption claimed by Conrail is *necessary* to effectuate the Board-approved Transaction. *See* 49 U.S.C. § 11321(a).

“[This] immunity provision does not exempt carriers from all law, but rather from all law necessary to carry out an approved transaction.” *Norfolk & Western Ry. Co. v. American Train Dispatchers Ass’n*, 499 U.S. 117, 1134 (1991). “By its terms, the [§ 11321(a)] exemption applies only when *necessary* to carry out an *approved* transaction.” *Id.* at 1127 (1991) (emphasis in original).

The purpose of § 11321(a) is to ensure that once an acquisition or consolidation is approved by the Board, obligations imposed by laws such as the Railway Labor Act, or other contractual obligations, “will not prevent the efficiencies of consolidation from being achieved.” *American Train Dispatchers Ass’n*, 499 U.S. at 133. Thus, § 11321(a) allows the Board to abrogate contract rights *only* if the Board determines that such action is *necessary* to effectuate an approved transaction. *See id.*; *see also Harris v. Union Pacific Railroad*, 141 F.3d 740, 744 (7th Cir. 1998) (emphasis added) (finding that *American Train Dispatchers Ass’n* “holds that the word ‘all’ in [§ 11321(a)] must be taken literally, and that approval of a merger therefore relieves the railroad of labor agreements *that would block completion of the transaction . . .*”); *City of Palestine, TX v. ICC*, 559 F.2d 408, 415 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978)

(holding that the STB does not have the power to engage in the “gratuitous destruction of contractual relations *even when it serves the general public interest* when the destruction is *irrelevant* to the success of approved transactions”);⁶ *Union Railroad Company v. United Steelworkers of America*, 242 F.3d 458, 468 (3rd Cir. 2001) (holding that the STB has exclusive jurisdiction over labor disputes that pose an *obstacle* to *implementation* of a STB-authorized transaction); *Norfolk and Western Ry v. Brotherhood of Railroad Signalmen*, 164 F.3d 847, 855 (4th Cir. 1998) (same); *Railway Labor Executives' Association v. Southern Pacific Transportation Company*, 7 F.3d 902, 906 (9th Cir. 1993) (same).

Before the District Court, Conrail argued that requiring it to reduce the fees charged to AT&T under the License Agreement would disrupt the “delicate balance” crafted by the Board in Decision No. 89 in which it purportedly “*decided* to leave some income with Conrail vis-a-vis these fiber optic agreements, so that Conrail could continue to operate.” *H.T.* at 64. And it apparently was that representation that led the District Court to seek the Board’s input into the question of whether AT&T’s claims do “disrupt the ‘delicate balance’ inherent in Decision 89.” *See* Ex. 1 at 21. Conrail presumably has not asserted such a claim here because the Board would know better.⁷

⁶ Conrail contended to the District Court that *City of Palestine* is no longer good law, having been rejected by the Eleventh Circuit. *See H.T.* at 60. But Conrail is wrong. In *Brotherhood of Railway Carmen v. CSX Transportation, Inc.*, 855 F.2d 745 (11th Cir. 1988), the Eleventh Circuit simply pointed out – correctly – that the question of the court’s subject matter jurisdiction was not raised in *City of Palestine*, and held that the district court in that case did not have jurisdiction because any appeals from the arbitration award obtained according to ICC procedures were to be made in the first instance to the ICC and then to the Circuit Court. Thus, the district court proceeding constituted an improper collateral attack on an arbitration award. In 2002, this Board cited *City of Palestine* with approval for the proposition that “pre-merger contracts not pertinent to the merger are not exempted under 49 U.S.C. 11321.” *The Township of Woodbridge v. Consolidated Rail Corporation, Inc.*, STB Docket No. 42053, 2000 STB LEXIS 709 at *10 n. 12.

⁷ There is no evidence in Decision No. 89 that the parties to the Transaction told the Board that the payments Conrail was receiving from AT&T or any other right of way licensee were necessary to Conrail’s continued post-transaction operations. On the contrary, as noted above, (footnote continued on next page)

Conrail now appears to argue that preemption does not require any impairment of the transportation benefits intended to result from the approved transaction, but only a *relationship* to that transaction. While the Board has stated that the necessity test does not require a finding that the consolidation *could not go forward* without preemption of the law or contractual provision from which an exemption is sought, the test announced by the Board in *Consolidation Coal* nevertheless requires a “nexus” between the challenged law or provision and the “*effectuation* of the transportation benefits intended to result from the authorized transaction.” *Consolidation Coal Sales Company v. Consolidated Rail Corp.*, F.D. No. 34169, 2002 STB LEXIS 317 at * 14. The Board's formulation makes clear that, consistent with the statutory language, an exemption may be found only where the challenged law or provision poses a real impediment to effectuation of those intended benefits. *The Township of Woodbridge v. Consolidated Rail Corporation, Inc.*, STB Docket No. 42053, 2000 STB LEXIS 709 at *10 n. 12 (“The purpose of section 11321 is to permit acquisitions to be carried out and to overcome legal impediments, where necessary.”)

Thus, whether the impediment must “block” the transaction or poses an obstacle to the transportation-related benefits that the merger was intended to bring about, there is not basis for preemption of AT&T's claims here. The Board's decision in *Consolidated Coal*, relied upon by Conrail, actually supports AT&T's position. In that declaratory proceeding, this Board faced the question whether two contract claims by Consolidation Coal against Conrail (relating to coal transportation services provided by Conrail) had been preempted by 49 U.S.C. § 11321(a) because the Board had expressly approved the assignment of the contracts at issue to PRR in connection with the Transaction. Notwithstanding that assignment, Consolidation Coal claimed

the parties told the Board that Conrail's operations would be funded by payments made by CXST and NSR, or if necessary, CSX and NS. *See* Decision No. 89 at 33; Conrail Ex. 1 at Section 4.3.

that (1) Conrail failed to pay certain minimum annual fee payments under a 1991 Terminal Agreement; and (2) by entering into the Transaction, Conrail also breached a 1992 agreement not to divert coal cargoes away from Consolidation Coal's terminal. 2002 STB LEXIS 317 at *2-6.

The Board found that, as it was structured, the Transaction expressly approved the assignment of the 1991 Agreement from Conrail to PRR, and therefore, necessarily relieved Conrail from its transportation service obligations under that agreement. 2002 STB LEXIS 317 at *11-12.

Here, the division of Conrail's assets between NS and CSX and the corresponding assignment of Conrail's contractual obligations related to those assets was *inherently necessary* for the parties to carry out the pro-competitive transaction that we authorized.

Id. at * 15. Thus, it concluded that, "as to contracts assigned to NYC or PRR, § 11321(a) necessarily forecloses a party to that contract from holding Conrail responsible for post-Split Date obligations."⁸ *Id.* at *12. As to whether Conrail could be held liable under the 1992 Agreement for entering into the Conrail Transaction, the Board recognized the obvious: "Conrail simply cannot be held liable, under State law, for entering into a contract . . . that contemplates a transaction . . . that we, acting under our exclusive authority under 49 U.S.C. 11323-25, have authorized . . ." *Id.* at *13.

Decision No. 89 also demonstrates that the Board recognizes that any exemption under Section 11321(a) must be "necessary to carry out this transaction." Decision No. 89 at 72. In connection with its approval of the Transaction, the Board considered Conrail's request that it override certain anti-assignment or other similar clauses in some of Conrail's contracts with shippers. Some of the shippers argued that they had bargained for a nonassignable contract and that their bargained-for contract rights "should not be undercut absent some very compelling

⁸ The STB declined to address whether the 1991 agreement was binding on PRR, since PRR was not a party to the CCSC proceedings. 2002 STB LEXIS 317 at *12.

reason.” *Id.* at 71. The Board generally agreed with the shippers’ argument but determined that a *limited six-month* override of the anti-assignment provisions was necessary to permit CSX and NS to carry out their transaction in an orderly manner. *Id.* The Board refused Conrail’s request for a permanent override of the anti-assignment provisions, however, concluding that the applicant had not demonstrated that a permanent override “*would be necessary to carry out this transaction.*” *Id.* at 72 (emphasis added).

All these cases demonstrate that more than a mere “relationship” to the Board-approved transaction is needed in order to justify preemption under 49 U.S.C. § 11321(a). Here, however, there is nothing more than a tangential relationship at best. Conrail simply has not shown that exempting it from its obligations under the MFN Covenant would prevent any of the efficiencies or transportation benefits of the Transaction from being achieved.

II. CONRAIL HAS FAILED TO MEET ITS BURDEN UNDER THE NECESSITY TEST

A. As The District Court Recognized, Conrail's First Question Is A Red Herring

Conrail’s first question, whether Decision No. 89 preempts a claim that Conrail breached the MFN Covenant by disabling itself of the ability to perform its obligations after the June 1, 1999 “Split Date”, is based upon the incorrect assertion that, in seeking to hold it responsible for its continuing MFN obligation for contracts entered into after June 1, 1999, AT&T “essentially alleges that Conrail should be held liable for entering into a Transaction Agreement that removed Conrail’s dominion over most of its former system.” *Conrail Mem.* at 4. As we have emphasized, AT&T believes that Conrail can and should perform its MFN obligations. The complaint merely included an *alternative* allegation that Conrail’s announcement that it no longer would honor the MFN Covenant (to the extent it was implicated

by the post-June 1, 1999 contracts) constituted a repudiation of the License Agreement.⁹ The District Court accepted this characterization as a fair reading of AT&T's complaint (Ex. 1 at 18 n. 13), and it further recognized that AT&T "is not directly challenging any STB-approved action taken by Conrail":

Rather, AT&T is challenging *the manner in which Conrail has allegedly cloaked itself in Decision No. 89, and used the decision as an excuse for its conduct, i.e., refusing to honor its contractual obligations under the MFN*. In other words, Conrail paints itself as a victim of STB-imposed circumstance, left with no choice but to continue to accept AT&T's license fees, while remaining unable to honor its obligations under the MFN. Taken in this light, it is not surprising that AT&T objects to Conrail's conduct as an illegal effort to run with the hare and hunt with the hounds.

Id. at 16 (emphasis added).

Conrail contends that if AT&T is merely claiming that the MFN Covenant applies to fiber optic contracts entered into by CSX/NYC or NS/PRR along former Conrail right of way, then Paragraphs 4, 39.d, 41 and 46 of its Complaint are "mere surplusage" and AT&T should withdraw its claim that Conrail has repudiated its contract. *Conrail Mem.* at 15 n. 5. But the fact that AT&T does not challenge the Conrail Transaction does not mean that these allegations are irrelevant. A party to a contract repudiates that contract when it makes a statement indicating that it will breach the contract. *See, e.g., Monarch Photo, Inc. v. Qualex*, 935 F.Supp. 1028, 1033 (D.N.D. 1996) (citing Restatement (Second) of Contracts § 250).

Here, the repudiation lies in Conrail's affirmative refusal to accept any responsibility for reducing AT&T's fees if fiber optic contracts entered into after June 1, 1999 charge its

⁹ Specifically, AT&T alleges that "Conrail has asserted to AT&T that it has no control over the transferred right of way and the third party operating companies and it does not have any authority over the terms of their license agreements[.]" Conrail Ex. 2, ¶ 33, and that Conrail is "disclaiming any responsibility for subsequent agreements providing for the use of the MFN Right of Way that may violate the MFN Covenant." Conrail Ex. 2, ¶ 39c.

competitors less than the fees AT&T pays Conrail, and *not* in the transfer of the right of way pursuant to the Board-approved Transaction.

Because AT&T is not challenging Conrail's transfer of its right of way – or any other aspect of the Transaction – this case is on a very different footing from *Consolidation Coal*. *First*, unlike AT&T here, Consolidation Coal's claims rested on both a direct and indirect challenge to the Transaction. Consolidation Coal sought to hold Conrail liable for its contracts that *it no longer had the ability to perform* because of the transfer of railroad lines (and related contracts) to PRR that was "inherently necessary" to the Transaction. *Consolidation Coal*, 2002 STB LEXIS 317 at * 15. Here, in contrast, Conrail did *not* assign any part of the License Agreement to NYC or PRR, but kept it as its own Retained Asset, and it can perform by reducing its fees to AT&T where necessary to comply with the MFN Covenant. Moreover, NYC or PRR accepted the right of way "SUBJECT TO" Conrail's rights and obligations under the License Agreement and expressly agreed in the Transaction Agreement to give Conrail whatever rights it needed to honor its License Agreement obligations. *Third*, in *Consolidation Coal*, Conrail not only had no obligations under the 1991 Agreement, it also received no benefits: Conrail was not receiving any continuing payments from Consolidation Coal. Here, Conrail continues to collect large monthly payments from AT&T while refusing to perform a key aspect of its bargain. Finally, the agreements in *Consolidation Coal* dealt directly with Conrail's rail transportation of coal; in contrast, the dispute here addresses how much AT&T is required to pay Conrail and is not in any way related to changes in rail transportation.

In sum, because AT&T is not challenging any Board-approved action, the Board should answer "No" to Conrail's first question, or simply refuse to answer it because it is based upon a false premise.

B. Conrail Has Not Demonstrated That It Should Be Exempt
From Liability Under the MFN Covenant for Post June 1, 1999
Contracts Entered into by CSX/NYC and NS/PRR

The real question posed by Conrail is whether Decision No. 89 preempts any claim arising from application of the MFN Covenant to contracts separately entered into by CSX/NYC and NS/PRR after June 1, 1999.¹⁰ In its efforts to persuade the Board that the answer to this question is “Yes,” Conrail asserts that, after June 1, 1999 it no longer has the ability to exercise either option available to it under the AT&T MFN Covenant: it cannot charge an AT&T competitor an average per mile fee at least equal to AT&T’s average per mile fee because it no longer has authority to negotiate license agreements, and it cannot lower AT&T’s fee to match the fee charged a competitor because neither it nor CSXT or NSR can make a rational business judgment about how to price new fiber optic contracts in relation to the price charged to AT&T. This claim is silly.

There is no question that Conrail *can* fulfill the MFN Covenant simply by reducing the fees it charges AT&T to match those charged to AT&T’s competitors. And it is obvious that Conrail’s sole shareholders, CSX and NS, who also control CSXT and NSR, ultimately control what contracts are entered into that may impact Conrail’s obligations to AT&T. CSX and NS are more than capable of deciding whether it is in their financial interest to obtain lower fees from AT&T’s competitors and then reduce the fees that Conrail receives from AT&T, or refuse to charge less to AT&T competitors in order to retain the full \$17 million annual fee AT&T now pays Conrail. The mere fact that they, and CSXT and NSR, as well as NYC and PRR may have to account for the fees being paid by AT&T in making that judgment, does not make the

¹⁰ Conrail acknowledges if AT&T does not challenge the Transaction or the right of way transfer in any way, then AT&T’s allegations amount to no more than a claim that the MFN Covenant applies to fiber optic contracts entered into by CSX/NYC or NS/PRR along former Conrail right of way. *Conrail Mem.* at 15 n. 5.

judgment any less *independent*. Therefore, the Board should reject Conrail's claim that requiring it to honor MFN obligations would interfere with "the right of CSX/NYC and NS/PRR to negotiate fiber optic contracts" after June 1, 1999. *Conrail Mem.* at 16 n. 6.

Likewise, while it may be true that Conrail has chosen to wear blinders to avoid learning the terms of the license agreements that CSXT and NST may have entered with AT&T's competitors, it defies credulity to claim that Conrail cannot obtain information about those terms if it chooses to do so. Indeed, because NYC and PRR took the right of way "SUBJECT TO" the AT&T License Agreement, NYC and PRR agreed to act in a fashion that was not inconsistent with the terms of the License Agreement, meaning *inter alia*, that they would be required to avoid doing anything that would interfere with Conrail's continuing obligations under the MFN Covenant. *See, e.g., Tenneco, Inc. v. May*, 377 F. Supp. 941 (E.D. Ky. 1974) (the servient holder has no right to use the land subject to an easement in such a manner as to interfere with the reasonable and prudent exercise and enjoyment of the easement by its owner). Indeed, even if Conrail were to produce a relevant deed that does not contain the "SUBJECT TO" clause, NYC and PRR would still be so restricted because each was clearly on notice of the existence of the License Agreement. *See, e.g., Morning Call, Inc. v. Bell Atlantic Pennsylvania, Inc.*, 761 A.2d 139 (Pa. Super. 2000) (successors in title take *subject* to an irrevocable license if they had notice of the license before the purchase).

In sum, the voluntary Transaction Agreement that Conrail, CSX and NS crafted and this Board approved contemplated that they and the newly created subsidiaries would cooperate and take the steps necessary to ensure that Conrail could continue to comply with its License Agreement obligations. These parties easily can share the information required to do that, or to make the independent business judgment not to comply and bear the consequences. They cannot simply elect not to cooperate, to remain ignorant, and to receive monies that are contingent on

compliance with the MFN License Agreement terms. Therefore, Conrail's second question must be answered in the negative.

C. Conrail Has Made No Showing That The Transfer Of Its Right Of Way Has Rendered Its Compliance With The MFN Covenant Commercially Impracticable

Conrail's third question, whether Decision No. 89 preempts any claim against Conrail arising from application of the MFN Covenant insofar as the transfer of the right of way to NYC and PRR now renders Conrail's compliance with the MFN Covenant "commercially impossible or impracticable," also must be answered "No." Simply stated there is nothing commercially impossible or impracticable in lowering AT&T's fees, if warranted.¹¹

Despite the apparent breadth of the question, Conrail focuses solely on the operation of the MFN Covenant in connection with a single agreement, its "barter contract" with Qwest. Conrail contends that as a result of the Transaction, it no longer needs telecommunications services Qwest, and therefore after June 1, 1999, it should have no obligation to reduce the fees paid by AT&T to the extent that Qwest is paying virtually nothing for its use of the right of way. But Conrail entered into that Qwest contract in 1996, well before it entered into the Transaction Agreement and sought the Board's approval of the Transaction. Conrail was entering into an open ended agreement under which it ran the risk that it would not need the Qwest capacity and that Qwest's costs for use of the right of way would be lower than AT&T's costs.¹² The Qwest

¹¹ To avail itself of an impossibility or impracticability defense, Conrail must demonstrate that its performance has been rendered objectively impossible. *Seaboard Lumber Co. v. U.S.*, 308 F.3d 1283, 1294 (Fed. Cir. 2002). Furthermore, the defense of impossibility of performance is available only where the promisor is not responsible for an event which makes performance impossible. *Id.* We note that these defenses are based upon state contract law. In *Consolidation Coal*, this Board refused to consider Conrail's state law defenses, finding that issues arising under state contract law are not within its primary jurisdiction. 2002 STB LEXIS 317 at *10 n.4.

¹² Conrail ignores the fact that the relevant inquiry for determining compliance with an MFN covenant is the comparative positions of the *licensees* and not the benefit to the licensor. *See Carpenter Tech. Corp. v. Armco, Inc.*, 800 F. Supp. 215, 221-22 (E.D. Pa. 1992).

agreement, therefore should be irrelevant to the inquiry before the Board and should be outside the scope of the questions that the District Court posed.¹³

Moreover, Conrail simply wants to forget that “performance” lies in reducing AT&T’s fees, and it remains perfectly capable of reducing those fees to the extent that AT&T is successful in proving in the District Court action that Qwest is paying an average per mile license fee that is lower than AT&T’s. Thus, there can be no argument that Conrail’s performance has been rendered objectively impossible.

Furthermore, when Conrail decided to enter into the Qwest Agreement in 1996, Conrail voluntarily accepted the risk that it might not need the communications capacity that Qwest agreed to provide in exchange for the use of Conrail’s right of way, and that such an event would impact its MFN obligations to AT&T. Indeed, Conrail cannot dispute that it did not use any Qwest capacity before the right of way transfer.

More important, when Conrail and the others voluntarily entered into the Transaction Agreement in which Conrail retained the License Agreement *and* the Qwest barter agreement, with all their benefits and burdens, they knew that Conrail’s own need for Qwest’s fiber optic capacity would be reduced or eliminated. Accordingly, the potential ramifications for the AT&T contract were well known and quantifiable. The parties to the Transaction could have made arrangements for PRR and NYC to make use of the fiber optic capacity provided by Qwest to the extent they concluded that such use might insulate Conrail from liability under the MFN Covenant. Indeed, Section 2.2 of the License Agreements expressly provides that

¹³ If the Board does address it, it must be noted that question posed by Conrail is overbroad and inaccurate, since in connection with this question, Conrail addresses *only* the Qwest barter contract. Conrail presents no argument for any finding by the Board in connection with any other contract that its transfer of its right of way renders its compliance with the MFN Covenant commercially impracticable.

NYC and PRR, shall, to the extent permitted under such [fiber optic contracts] that are designated as Retained Assets, be given equal access to [Conrail's] or its Affiliates' rights to use capacity on such fiber optic cable and shall participate equally in any other benefits of such Contracts.

Conrail Ex. 1 at Section 2.2. Nor can Conrail deny that it had the right to assign any or all of its rights under the Qwest barter contract – the right to use the capacity could have been assigned to NYC and PRR or any other entity.

III. EFFECT OF CONRAIL'S PETITION FOR SUPPLEMENTAL ORDER (SUB-NO. 94)

AT&T agrees with Conrail that the consolidation proposed in STB Finance Docket No. 33388 (Sub-No. 94) (which petition was granted by the Board by Order dated November 7, 2003) has no effect on the correct answer to the questions proposed by Conrail and the District Court in this proceeding. It does, however, demonstrate that Conrail's position here is a subterfuge. That petition was based in part on what Conrail characterizes as "the STB-approved reality that CSX and NS, respectively, control NYC and PRR." *Conrail Mem.* at 21. The the "reality" of those relationships as described by Conrail is exactly what demonstrates that Conrail's claimed inability to have any say in or knowledge of the fiber optic licenses that may have been entered into on its former right of way after June 1, 1999 is false and cannot serve to excuse Conrail from meeting its obligations.

PRAYER FOR RELIEF

For all of the foregoing reasons, as well as those set forth in AT&T's prior submissions to the Board in this matter, AT&T respectfully requests that the Board issue an order in which it responds as follows to the questions posed in Conrail's Petition for Institution of a Declaratory Order Proceeding and in the Memorandum Opinion and Order of the U.S. District Court for the Eastern District of Pennsylvania:

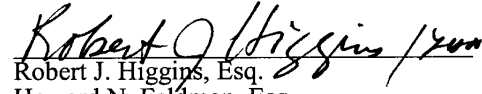
- (1) Answers "No" or otherwise rejects the first question as based on a false premise;
- (2) Answering "No" to the second question; and

(3) Answering "No" to the third question.

Date: November 12, 2003

Respectfully submitted,

Lois J. Lipton, Esq.
AT&T LAW DIVISION
222 W. Adams Street, Suite 1500
Chicago, IL 60606
Telephone: (312) 230-2667
Facsimile: (312) 977-9511


Robert J. Higgins, Esq.
Howard N. Feldman, Esq.
B. Haven Walling, Jr., Esq.
Laura H. Hamilton, Esq.
DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
Telephone: (202) 785 9700
Facsimile: (202)-887 0689

Paul H. Lamboley, Esq.
1701 Pennsylvania Avenue
Suite 300
Washington, D.C. 20006
Telephone: (202) 879-2623
Facsimile: (202) 879-2624

Attorneys for AT&T Communications, Inc.

CERTIFICATE OF SERVICE

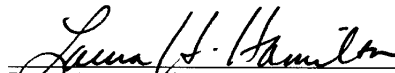
I hereby certify that on November 12, 2003 I caused a copy of the foregoing *AT&T Communications, Inc. 's Reply to Conrail's Opening Evidence and Argument* to be served upon the following counsel for Petitioner Consolidated Rail Corporation:

by hand delivery to:

Robert M. Jenkins, III, Esq.
Brad P. Rosenberg, Esq.
MAYER BROWN ROWE & MAW
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3261

and by first-class mail, postage prepaid, to:

Ralph G. Wellington, Esq.
Nancy Winkelman, Esq.
Joseph T. Lukens, Esq.
SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street, Suite 3600
Philadelphia, PA 19103
(215) 751-2000.



Laura H. Hamilton

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AT&T COMMUNICATIONS, INC.,
Plaintiff

v.

CONSOLIDATED RAIL
CORPORATION,
Defendant

CIVIL ACTION
NO. 03-147

ENTERED
SEP 29 2003
CLERK OF COURT

MEMORANDUM OPINION AND ORDER

RUFE, J.

September 29, 2003

Presently before the Court are (1) Defendant's Partial Motion to Dismiss for Lack of Subject Matter Jurisdiction, or, in the Alternative, for Partial Referral to the Surface Transportation Board, and for a Stay Pending Resolution by the Surface Transportation Board; and (2) Defendant's Motion for a Protective Order. For the reasons set out below, the Court will deny the motion to dismiss; grant the motion to refer; grant in part and deny in part the motion for a stay; and deny the motion for a protective order.

I. BACKGROUND

Plaintiff in this case is AT&T Communications, Inc., a telecommunications equipment and service provider. AT&T is a Delaware corporation with its principal place of business in New Jersey. Defendant is Consolidated Rail Corporation ("Conrail"), a Pennsylvania corporation with its principal place of business in Pennsylvania. Jurisdiction is premised on diversity of citizenship. See 28 U.S.C. § 1332(a). This case was originally before the Honorable Bruce W. Kauffman, who held a hearing on the pending motion to dismiss on July 10, 2003. The case was subsequently transferred to the calendar of the undersigned pursuant to the Eastern District

transactions such as sales, leases, consolidations, and mergers. 49 U.S.C. § 11321.

After providing for the required public notice, comment and hearings on the proposed Transaction Agreement, see 62 Fed. Reg. 39577 (July 23, 1997), in which AT&T did not participate, the STB approved the Transaction Agreement on July 23, 1998. See CSX Corp. and CSX Transp. Inc., Norfolk Southern Corp. and Norfolk Southern Ry. Co. - Control and Operating Leases/Agreements - Conrail Inc. and Consolidated Rail Corp., 3 S.T.B. 196, 1998 STB LEXIS 243 (July 23, 1998) (hereinafter "Decision No. 89"). The STB required that the Transaction include certain conditions, and it is these conditions that gave rise to the instant dispute.

Most significantly, the STB required the creation of two subsidiaries of Conrail: New York Central Lines LLC ("NYC") and Pennsylvania Lines LLC ("PRR"). Although both new companies are subsidiaries of Conrail, CSX appoints all officers and directors of NYC, and NS appoints all officers and directors of PRR. See id. at *34. The STB also designed a plan for reallocation of Conrail's assets, which it grouped into three categories. "Allocated Assets" are assets that Conrail transferred to the sole and exclusive ownership of NYC or PRR for operation by CSX and NS. "Shared Assets" are assets that are shared by Conrail, NYC, and PRR. "Retained Assets" are assets retained solely by Conrail. See id. at *34-35.

The "Split Date" for the Transaction was June 1, 1999, at which time Conrail conveyed as Allocated Assets approximately ninety percent of its right of way to NYC and PRR. As a consequence, CSX and NS, respectively, operate the former Conrail railroad lines now owned by NYC and PRR, respectively.² Some of the quitclaim deeds state that the right of way

² Although AT&T claims that as a result of the Transaction Conrail is largely out of the transportation business, Conrail's general counsel explained to the Court at a July 10, 2003 hearing that Conrail still operates some rail interchanges and yards, and about 1,300 miles of track. N.T. at 43:19-25.

license fees.⁴

AT&T's only specific allegation of a breach of the MFN relates to a 1996 agreement between Conrail and Qwest Communications Corp. ("Qwest"), in which Conrail permitted Qwest to install FOC along its right of way in exchange for Qwest allowing Conrail to use Qwest's cable for railroad operation-related telecommunications purposes, rather than money (the "Qwest Barter Agreement"). Post Split-Date, Conrail has no significant need for Qwest's FOC communications capacity, although NYC and PRR are in fact using portions of it. See N.T. 40:13-24. AT&T protests that it is paying millions of dollars in fees under the License Agreement, while Qwest is paying "virtually no consideration" for use of the same right, and that this arrangement violates the MFN.

II. CONRAIL'S PARTIAL MOTION TO DISMISS/REFER/STAY

Conrail's Motion asks this Court to dismiss portions of the Complaint for lack of subject matter jurisdiction. In the alternative, Conrail moves the Court to refer certain issues to the STB for resolution. Finally, if the Court grants either form of relief, Conrail seeks a stay of the entire action pending resolution of the proceedings before the STB.

With the exception of issues related to the Qwest Barter Agreement, Conrail's motion does not relate to any of AT&T's claims based on contracts that Conrail entered *before* the Split Date. Rather, Conrail argues that AT&T's claims based on *post*-Split-Date contracts implicate

⁴ At the July 10, 2003 hearing, Conrail posited that it is entitled to all of the benefits of the License Agreement, but must bear none of the burdens. Conrail's counsel balked at providing an explanation of Conrail's legal position, insisting that this question goes to the merits of AT&T's claims, which have no bearing on Conrail's motion to dismiss/refer/stay the case. Conrail contends that the merits issues are properly before the STB, not this Court. See discussion *infra*. Near the conclusion of the hearing, Conrail's counsel shed some light on its legal argument: that this arrangement "was part of the delicate balance" constructed by the STB when it approved the Transaction. N.T. 64:18-19.

alleged in the complaint. Carpet Group Int'l v. Oriental Rug Imp. Ass'n, Inc., 227 F.3d 62, 69 (3d Cir. 2000). Such is not the case here. Rather, Conrail's motion advances a facial attack, and argues that the Complaint includes allegations not properly before the Court. When considering a facial attack, the Court must accept as true all well-pleaded allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. Gould Elecs. Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000).

Conrail argues that the Court lacks subject matter jurisdiction over claims arising from the division of assets authorized by the STB. Under the Interstate Commerce Act ("ICA"), 49 U.S.C. § 11321(a), the STB has "exclusive" authority to approve rail mergers and consolidations. In addition, § 11321(a) exempts such transactions "from the antitrust laws and from all other law . . . as necessary . . . to carry out the transaction."⁵ Conrail contends that some of AT&T's contract claims are preempted under this statutory provision.⁶ Before it may reach this question, however, the Court must confront the issue presented by Conrail's motion: does this Court have jurisdiction to decide the preemption issue, or does jurisdiction over the issue rest exclusively with the STB?

⁵ The statute provides, in pertinent part:

The authority of the Board under this subchapter is exclusive. A rail carrier or corporation participating in or resulting from a transaction approved by or exempted by the Board under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

49 U.S.C. § 11321(a).

⁶ There is no question that the § 11321(a) exemption "is broad enough to include laws that govern the obligations imposed by contract." Norfolk and Western Ry. Co. v. Am. Train Dispatchers' Assoc., 499 U.S. 117, 129 (1991). AT&T conceded this point at the hearing. N.T. 25:8-13.

exemption in § 11341 (now § 11321), and moved to dismiss for lack of subject matter jurisdiction. The district court granted the motion, concluding that the ICC had exclusive authority over the matter. See Southern Pac., 7 F.3d at 903-05.

The Ninth Circuit affirmed, and held that the question of whether § 11341 preempted the unions' claims under the RLA must be raised before the ICC (now the STB). Id. at 905-909. The court first looked to Norfolk and Western Railway Co. v. American Train Dispatchers' Ass'n, 499 U.S. 117, 129 (1991) (hereinafter "Dispatchers") in order to discern the Supreme Court's "overall conception of the statutory scheme," which it found "determinative of this case." Southern Pac. 7 F.3d at 906. In Dispatchers, the Supreme Court held that § 11341 may exempt a party, "as necessary to carry out a transaction approved by the [ICC]," from its legal obligations under an existing collective bargaining agreement, and under the RLA. 499 U.S. at 128-134. However, Dispatchers did not resolve which forum - - the ICC or a federal district court - - has jurisdiction to adjudicate the applicability of the § 11341 (now § 11321) exemption.

Looking to Dispatchers and the ICA, the Ninth Circuit reasoned that (1) because the ICA grants to the ICC the exclusive authority to examine, condition and approve proposed railroad mergers, and (2) because Dispatchers makes clear that the ICC has the power to exempt parties to such mergers from any provisions of the RLA by approving that merger, it follows "that where a railroad which has been a party to an ICC-approved merger claims that certain proposed actions are incident to that merger and exempt from RLA procedures under section 11341(a), the ICC has exclusive authority to resolve a challenge to these claims." Southern Pac., 7 F.3d at 906. Turning to the case before it, the Ninth Circuit concluded:

Southern Pac., 7 F.3d at 903-04. By contrast, the RLA provides that changes to collective bargaining agreements may be arbitrated only with the *mutual consent* of both parties. See id. at 904 (citing 45 U.S.C. § 157).

The case arose following a consolidation of rail carriers and other companies. Thereafter, the newly merged railroad sought to consolidate certain clerical work. When negotiations with unionized employees failed, as was the case in Southern Pacific, the unions in Steelworkers claimed that the ensuing dispute over the proposed coordination of clerical workers had to be resolved under RLA procedures, not under the New York Dock procedures, and sought declaratory and injunctive relief to that effect in federal district court. The district court dismissed the claim for lack of subject matter jurisdiction. See id. at 460-62.

The Third Circuit affirmed, and agreed with the railroad that “the STB has exclusive jurisdiction to consider disputes concerning changes to labor agreements which are necessary to implement an STB-authorized consolidation.” Id. at 463. Like the Southern Pacific court, the Steelworkers court noted that the “almost interminable process” associated with RLA negotiations was inconsistent with the ICA’s goals of efficiency and economy in interstate transportation. Id. at 463-65 (citation omitted). It then reviewed two opinions that had addressed the same jurisdictional issue: Southern Pacific, as well as an analogous decision by the Fourth Circuit Court of Appeals in Norfolk & Western Railway v. Brotherhood of Railroad Signalmen, 164 F.3d 847, 855 (4th Cir. 1998) (hereinafter “Signalmen”).

After rejecting the unions’ argument that the language and structure of the ICA makes the § 11321 exemption inapplicable to the merger at hand (an issue not presented in this case), the court emphasized that in the event of a railroad merger “the ICA puts within the exclusive jurisdiction of the STB . . . the relationship between the railroad and its employees,” and mandates that affected employees be protected by a “fair arrangement.” Steelworkers, 242 F.3d at 466 (citing 49 U.S.C. §§ 11324, 11326). “All this demonstrates . . . that ‘to the extent that a transaction subject

There, the court considered whether a district court may consider claims brought by two employees against a newly merged railroad, or whether the ICC had exclusive jurisdiction to resolve the claims. Like it did in Southern Pacific and Steelworkers, the ICC gave its assent to the merger subject to the standard New York Dock conditions. However, the ICC also permitted labor and management to negotiate an alternative set of conditions to protect employee interests affected by the merger. The parties reached such an agreement, which provided that up to 300 clerical employees could elect separation benefits in lieu of involuntary transfers or layoffs that would accompany implementation of the merger. Significantly, only employees at work when the agreement was announced were eligible, and employees on leave had to return to work within twenty days in order to be eligible. See Harris, 141 F.3d at 741-42.

Two employees were on maternity leave at the time the agreement was announced, and they did not return to work within twenty days. Their applications for separation benefits were denied and they brought suit, alleging, inter alia, sex discrimination under the federal Pregnancy Discrimination Act. The district court concluded that the ICC's approval of the merger foreclosed the plaintiffs' claims unless the STB (as successor to the ICC) authorized the litigation. See id. at 742.

The Seventh Circuit reversed. While it agreed that the civil rights laws are encompassed by § 11321(a)'s exemption from "all other law," it rejected the Ninth Circuit's approach, as outlined in Southern Pacific, that only the ICC may determine which other laws it is "necessary" to set aside. See id. at 743. It noted that in approving the merger at issue in Harris, the ICC "did not say 'boo'" about the necessity of displacing civil rights laws in order to effectuate the merger, nor did the ICC in permitting an alternative to the New York Dock conditions "invite or

about AT&T's License Agreement when it approved the Transaction. Thus, it contends, the Court is well within its jurisdiction to address whether the STB's authorization, as outlined in Decision No. 89, preempts AT&T's contract claims.

On the basis of Southern Pacific and Steelworkers, Conrail argues that some of AT&T's claims fall within the STB's exclusive jurisdiction because they ask this Court to "consider matters that go to the heart of the STB's approval and supervision of the CSX/NS/Conrail Transaction - - and if allowed, that could greatly frustrate the goals of that Transaction." Def. Motion at 10. In doing so, Conrail engages in clear hyperbole regarding a rather close question.

First, it is not at all apparent that AT&T's claims go to the "heart" of the STB's approval and supervision of the Transaction in the same way that the unions' claims did in Southern Pacific or Steelworkers. As those cases emphasize, the "heart" of any STB approval of a consolidation is promoting "economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure." Dispatchers, 499 U.S. at 132 (quoting Texas v. United States, 292 U.S. 522, 534-35 (1934)). The cases cited by Conrail - - Southern Pacific and Steelworkers - - set out convincingly that when a union challenges the manner in which an STB-authorized transaction is *actually carried out*, such a challenge implicates the STB decision itself, and thus places the dispute within the jurisdiction of the STB. In other words, where a party's claim seeks to affect the *actual implementation* of the transaction, such a claim goes to the heart of the STB's authority to condition and approve the transaction.

Conrail's efforts to analogize Southern Pacific and Steelworkers to the instant matter are ultimately unpersuasive. In fact, AT&T is not directly challenging any STB-approved action taken by Conrail. In Conrail's view, AT&T's breach of contract claim is an attack on the

that allowing such inevitable controversy to proceed through the federal courts would open the floodgates to “a barrage of collateral challenges to the [STB’s] authority which would be likely to frustrate and delay the administration of mergers in a way that section [11321(a)] was clearly meant to avoid.” *Id.* at 906-07. No such similar concerns arise here. As such, Conrail has failed to persuade the Court that the issues presented by its contractual dispute with AT&T so clearly threaten the Transaction or the STB’s ability to effectively manage similar transactions that it is within the STB’s *exclusive* jurisdiction to resolve.

Under Southern Pacific and Steelworkers, it is clear that the Court’s decision on the jurisdictional issue must turn at least in part on the degree to which AT&T’s claims actually challenge the implementation of the STB-approved Transaction. If they do, then the STB must address the question of whether Decision No. 89 preempts such claims in the first instance.¹¹

An examination of the Complaint reveals that AT&T is perhaps overstating the matter when it argues that this case has “nothing to do with federal regulation of railroads or transportation issues.” AT&T’s Opp. at 1. Specifically, AT&T alleges that Conrail has breached its express and implied duties under the License Agreement by:

- c. transferring portions of the MFN [right of way] to its wholly-owned subsidiaries (NYC and Pennsylvania Lines) and then disclaiming any responsibility for subsequent agreements providing for the use of the MFN [right of way] that may violate the MFN Covenant;
- d. transferring portions of the MFN [right of way] to its wholly-owned subsidiaries (NYC and Pennsylvania Lines) and then divesting itself of the ability to perform its obligations under the MFN Covenant;

¹¹ The Court declines to follow the analysis utilized by the Seventh Circuit in Harris, 141 F.3d 740. The Third Circuit’s opinion in Steelworkers suggests this is the appropriate course. *See* 242 F.3d at 466-68 (following the broader approach utilized in Southern Pacific, 7 F.3d 902, and Signalmen, 164 F.3d 847, and finding Harris distinguishable).

that the matter involves technical or policy considerations which are beyond the court's ordinary competence and within the agency's particular field of expertise." MCI Communications Corp. v. Am. Tel. & Tel. Co., 496 F.2d 214, 220 (3d Cir. 1974); see also Puerto Rico Mar. Shipping Auth. v. Valley Freight Sys., Inc., 856 F.2d 546, 549 (3d Cir. 1988) ("[T]he rationale of the doctrine is that the subject matter falls so squarely within the agency's domain that a court should permit the agency to initially resolve the question presented.").

The doctrine serves to "avoid conflict between the courts and an administrative agency arising from either the court's lack of expertise with the subject matter of the agency's regulation or from contradictory rulings by the agency and the court." Id. The Third Circuit has cautioned, however, that courts "should not be too hasty in referring a matter to an agency . . . whenever a controversy remotely involves some issue falling arguably within the domain of the agency's 'expertise.'" MCI Tel. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1104 (3d Cir. 1995) (quoting Elkin v. Bell Tel. Co. of Pa., 491 Pa. 123 (1980)). Rather, referral is appropriate only "where the subject matter is within an agency's jurisdiction and where it is a complex matter requiring special competence, with which the judge or jury would not or could not be familiar." Id. Once an issue is referred to an agency under the doctrine of primary jurisdiction, "that agency's determination is binding upon the court and the parties . . . and is not subject to collateral attack in the pending court proceeding." Id. at 1103. See generally Tassy v. Brunswick Hosp. Ctr., Inc., 296 F.3d 65, 67-68 (2d Cir. 2002) (discussing evolution of primary jurisdiction doctrine).

"No fixed formula exists for applying the doctrine of primary jurisdiction." United States v. Western Pac. R.R. Co., 352 U.S. 59, 64 (1956). The Supreme Court has emphasized, however, that the doctrine comes into play when "the reasons for the existence of the doctrine are

The Court will grant Conrail's motion to refer the case to the STB. First, as set forth in Part A supra and in the statute itself, the issue of whether the § 11321(a) exemption applies to an STB-authorized transaction is within the agency's jurisdiction. In addition, as the Southern Pacific court recognized, when the STB has the authority to approve a merger in the first place, it should be permitted to "clarify the scope of its own approval and the corresponding breadth of the section [11321] exemption." 7 F.3d at 906.

Second, the STB possesses the expertise necessary to resolve the instant dispute. As Conrail notes, the STB has studied the Transaction; entertained public comment, hearings, and arguments on the Transaction; and memorialized its approval in a lengthy, detailed document.¹⁴ As the Supreme Court has noted, when the issue presented requires a determination "reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly found only in a body of experts," then the issue must go first to those experts. Western Pac., 352 U.S. at 66. Here, those experts reside in the STB. Given its prior investment of resources and intellectual capital in the Transaction, there can be little question that the STB possesses special expertise on whether certain issues would implicate Decision No. 89. The question of whether AT&T's claims are exempted under § 11321 begs this kind of special competence. Thus, the Court will call upon the STB's expertise to determine if AT&T's claims will, as Conrail's counsel put, disrupt the "delicate balance" inherent in Decision No. 89. N.T. 64:19.

Finally, referral is appropriate in order to avoid the danger of inconsistent rulings. As noted above, Conrail filed a petition with the STB on February 25, 2003 seeking a declaratory

¹⁴ The Lexis version of Decision No. 89 consists of approximately 100 pages of single-spaced, twelve-point text. See 1998 STB LEXIS 243.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AT&T COMMUNICATIONS, INC.,
Plaintiff

v.

CONSOLIDATED RAIL
CORPORATION,
Defendant

:
:
:
:
:
:
:
:
:
:
:

CIVIL ACTION
NO. 03-147

ORDER

AND NOW, this 29th day of September, 2003, the Court hereby enters the following rulings:

I. Upon consideration of Defendant's Partial Motion to Dismiss for Lack of Subject Matter Jurisdiction, or, in the Alternative, for Partial Referral to the Surface Transportation Board, and for a Stay Pending Resolution by the Surface Transportation Board [Doc. # 5], Plaintiff's Opposition thereto [Doc. # 14], Defendant's Reply [Doc. # 16], after a July 10, 2003 hearing on the record [Doc. # 28], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** that Defendant's Motion is **GRANTED IN PART** and **DENIED IN PART**. It is specifically **ORDERED** that:

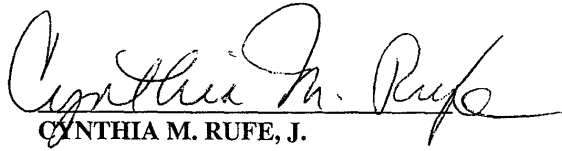
- A. Defendant's Partial Motion to Dismiss is **DENIED**;
- B. Defendant's Motion for Partial Referral is **GRANTED**;
- C. Defendant's Motion to Stay is **GRANTED IN PART** and **DENIED IN PART**.

It is further **ORDERED** that:

- i. The parties are hereby granted leave to conduct discovery regarding all issues arising out of contracts entered between January 1984 and June

It is so **ORDERED**.

BY THE COURT:


CYNTHIA M. RUFÉ, J.

7-10-03.txt

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AT&T COMMUNICATIONS, INC., : CIVIL ACTION NO. 03-0147
Plaintiff :
v. : Philadelphia, Pennsylvania
CONSOLIDATED RAIL : July 10, 2003
CORPORATION, : 11:00 o'clock a.m.
Defendant :
.....

HEARING
BEFORE THE HONORABLE BRUCE W. KAUFFMAN
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff: HOWARD N. FELDMAN, ESQUIRE
ROBERT J. HIGGINS, ESQUIRE
Dickstein Shapiro Morin & Oshinsky, LLP
2101 L Street, NW
Washington, DC 20037

MATTHEW J. SIEMBIEDA, ESQUIRE
Blank Rome LLP
One Logan Square
Philadelphia, PA 19103

For the Defendant: ROBERT M. JENKINS, III, ESQUIRE
Mayer, Brown, Rowe & Maw
1900 K Street, NW
Washington, DC 20006

RALPH G. WELLINGTON, ESQUIRE
NANCY WINKELMAN, ESQUIRE
Schnader, Harrison, Segal & Lewis
1600 Market Street, Suite 3600
Philadelphia, PA 19103

Audio Operator: Micahel Beck

Transcribed by: Tracey J. Williams, CET

(Proceedings recorded by electronic sound recording;
transcript provided by AAERT-certified transcriber.)

0

1 (The following hearing occurred in open court at
2 11:00 o'clock a.m.):

3 THE COURT: Mr. Siembieda -- is that the way to
4 pronounce it?

5 MR. SIEMBIEDA: Yes, your Honor.

6 THE COURT: I want to be sure I pronounce it
7 correctly.

8 MR. SIEMBIEDA: Thank you, your Honor.

9 THE COURT: Are you going to be doing the arguing
10 today?

11 MR. SIEMBIEDA: No, Mr. Higgins from Dickstein
12 Shapiro is going to be doing the argument today, your Honor.

13 THE COURT: Very well. And Mr. Wellington?

14 MR. WELLINGTON: Yes, your Honor.

15 THE COURT: Good morning.

16 MR. WELLINGTON: Good morning.

17 THE COURT: This is AT&T Communications against
18 Consolidated Rail Corporation, 03-CV-147.

19 By order dated May 1, 2003, the Court scheduled oral
20 argument limited to the issues raised in Consolidated Rail
21 Corporation or Conrail's -- I don't know what a partial
22 motion is, but I assume that it's a motion to partially
23 dismiss. I think the partial was --

24 MR. WELLINGTON: I think it's in the wrong side of
25 that, your Honor --

□

1 THE COURT: I think so too.
Page 2

7-10-03.txt

2 MR. WELLINGTON: -- I agree with you.

3 THE COURT: I was wondering about that as I was
4 reading it. It's a full motion to do a partial thing?

5 MR. WELLINGTON: For partial relief --

6 THE COURT: Right.

7 MR. WELLINGTON: -- no, for full relief on a partial
8 matter or something.

9 THE COURT: To dismiss for lack of subject matter
10 jurisdiction or, in the alternative, for partial referral to
11 the Surface Transportation Board and for a stay pending
12 resolution by the Surface Transportation Board.

13 This is really, at least we start out with a
14 contract dispute, and my first question to you all, and I
15 suppose it's probably a reflection of my lack of expertise in
16 this area, but I start out as an old-timer thinking that we
17 do have what's known as the sanctity of contracts, and we
18 have a contract here and it just goes against the grain to
19 think that the contract can simply be abrogated without any
20 compensation. And nobody raised -- so far as I know, nobody
21 raised the issue about whether the Government can pass a law
22 that simply abrogates a contract without any compensation,
23 without any consideration, just say, you know, we're going to
24 move ahead with what best suits the transportation entity and
25 forget about AT&T's rights which they had under an existing

□

4

1 contract. I may be way off base in that thinking and --

2 MR. HIGGINS: I'd be happy to bring you closer to
3 the line, your Honor.

4 THE COURT: Okay. Well, since it's the defendant's
Page 3

7-10-03.txt

5 partial motion, why don't we hear from the defendant first.

6 MR. WELLINGTON: If I may, your Honor?

7 THE COURT: Of course.

8 MR. WELLINGTON: Thank you.

9 THE COURT: Wherever you're most comfortable, and
10 you have as much time as you want.

11 MR. WELLINGTON: Well, thank you, your Honor.

12 Again, Ralph Wellington for Conrail. At counsel's table is
13 Mr. Rob Jenkins from the Mayer, Brown firm --

14 THE COURT: Welcome, sir.

15 MR. WELLINGTON: -- who has been admitted in this
16 case; and Nancy Winkelman, my partner.

17 THE COURT: This is -- it's a very fascinating
18 question, as far as I'm concerned.

19 MR. WELLINGTON: It is. And I also note that we
20 have summer clerks from both the Blank firm and the Schnader
21 firm, I gather some of whom are going to be meeting with you
22 afterward --

23 THE COURT: I think we may even have some from the
24 Dilworth firm here, I'm not sure.

25 MR. WELLINGTON: Do we have some from the Dilworth

0

5

1 firm? Oh?

2 And then some are going to be meeting with your
3 magistrate judge afterwards, so --

4 THE COURT: And I'm going to have lunch with some of
5 them myself.

6 MR. WELLINGTON: Good.

7 THE COURT: This is summer clerk day, let's hope
Page 4

8 they learn something; A, what you should do, and maybe --
9 hopefully not, but maybe some of the things you shouldn't do.

10 MR. WELLINGTON: I'm sure Mr. Higgins will be an
11 example of what you should do and I'll try to avoid the
12 other, your Honor.

13 First of all, I want to respond directly to the
14 concern your Honor just expressed before I even get into the
15 outline of the argument that I wanted to present. There has
16 not been an abrogation of contract here. As we stand here
17 today --

18 THE COURT: Well, don't they have a most-favored
19 nation --

20 MR. WELLINGTON: As we stand here today -- yes, your
21 Honor -- as we stand here today, however, AT&T has
22 approximately 2700 miles of fiber optic cable that it's using
23 as part of its nationwide system --

24 THE COURT: Right, and they've paid millions and
25 millions and millions of dollars.

0

6

1 MR. WELLINGTON: -- and they pay for that -- right.
2 So, whether they pay Conrail or someone else, they are going
3 to pay for that right --

4 THE COURT: That's no problem.

5 MR. WELLINGTON: -- and that contract has not been
6 abrogated.

7 THE COURT: Well, but the part of the contract, at
8 least they allege that the part of the contract which gives
9 them the most-favored nations --

10 MR. WELLINGTON: There is --
Page 5

7-10-03.txt

11 THE COURT: -- position has been or is about to be
12 ignored. Overlooked?

13 MR. WELLINGTON: Part of that contract --

14 THE COURT: Overridden? I don't know.

15 MR. WELLINGTON: -- so we understand the contract,
16 part of that contract -- and, again, this is a 60-page
17 contract which has many -- there is -- many consideration of
18 parties on both sides. The MFN clause is one paragraph of a
19 60-page contract. So, it is not, as this motion -- or as the
20 briefing would seem to imply, it was not the consideration
21 for this contract. The consideration for this contract,
22 fundamentally -- and already I'm doing something I want to
23 avoid doing, which is we're into the merits of this issue
24 already and, as your Honor understands --

25 THE COURT: I understand.

□

7

1 MR. WELLINGTON: -- we don't believe the merits
2 should be discussed here at the moment, we believe those are
3 appropriately before the STB, but I do want to get -- respond
4 to your Honor's concerns and then I'll get to that issue.

5 The fundamental consideration in this contract was
6 2700 miles of our right-of-way for which you pay \$17 million
7 a year. There was a -- there were many provisions on both
8 sides, there is one -- there was an MFN protection in it,
9 which Conrail has acknowledged from the beginning of 1984 and
10 believes that it has honored since 1984. To the extent that
11 Conrail has been relieved by virtue of the STB-approved
12 transaction of the ownership of the right-of-way on which
13 that -- that fiber optic cable continues to exist, it doesn't

7-10-03.txt

14 own that right-of-way anymore, it was compelled to give it up
15 as part of this transaction. It therefore is unable, as a
16 matter of law and practice, to enforce what the new owners do
17 on that right-of-way and, hence, it can't guarantee that they
18 would not put in a new fiber optic agreement with somebody
19 else that might violate that most-favored-nations clause.

20 THE COURT: Right, but it could pay damages.

21 MR. WELLINGTON: Absolutely not, your Honor, and
22 that's what we need to talk about in the law.

23 THE COURT: Well, I'm not saying that it should, but
24 it could.

25 MR. WELLINGTON: Again, I preface this by saying

□

8

1 that's a merits issue. Now, if it was ultimately found --

2 THE COURT: No, no, no, no, whether or not --

3 MR. WELLINGTON: -- could it pay damages? Yes.

4 THE COURT: Whether or not they should pay damages
5 is a merits issue.

6 MR. WELLINGTON: Yes, it could pay damages.

7 THE COURT: Right.

8 MR. WELLINGTON: That's correct. That's different
9 from should, it could pay damages.

10 THE COURT: Because part of the most-favored-nation
11 clause was that, even if they may not be able to enforce the
12 equal charge, their charge would be reduced to the extent
13 that you were giving someone else -- or anyone was giving
14 someone else a reduced -- charged less than theirs for the
15 use of the fiber optics right-of-way.

16 MR. WELLINGTON: The most-favored-nation clause
Page 7

17 gives Conrail at its sole election and option the --

18 THE COURT: Yeah, but if Conrail puts itself in a
19 position where it's impossible to perform one of the
20 alternatives, isn't it responsible to perform at least the
21 other?

22 MR. WELLINGTON: Well, when and if the merits of
23 this are reached at the appropriate forum, that will be a
24 discussion.

25 THE COURT: And let me also put into the equation

□

9

1 here another issue, which I'm sure you'll want to confront,
2 and that is the extent to which -- and this may be an issue
3 of fact that we can't decide here yet -- the extent to which
4 -- concluding, for example, hypothetically, that we should
5 require Conrail to pay damages, how that would affect the
6 transaction and would it affect the transaction, and would it
7 affect the transaction with sufficient materiality to -- even
8 if you're right about the preemption issue -- to be entitled
9 to be covered by the preemption issue, or is it simply one of
10 those contracts that could be performed without affecting
11 adversely the transaction approved by the Surface
12 Transportation Board?

13 MR. WELLINGTON: I'll show you why it couldn't be,
14 your Honor, and then -- again, this is fundamentally issue of
15 merits that we believe the Board needs to be deciding, but
16 the fund -- AT&T's fundamental complaint post-June 1st, 1999,
17 which is all this motion is about, that post-split date, is
18 that Conrail was ordered to convey the right-of-way to two
19 new corporate entities that were created as part of the

20 transaction. Hence, but for the STB-approved transaction,
21 the very entities who now have that -- have the right-of-way
22 didn't exist and, therefore, this is inherent in a true --
23 inherent as part of that transaction, because but for the
24 transaction we wouldn't be here and those entities that now
25 own the right-of-way over which Conrail does not have the

0

10

1 power to enforce the MFN didn't exist. What AT&T hopes to do
2 is say, well, Conrail, you still have to pay even though the
3 entities created by the STB as part of the transaction --

4 THE COURT: Wasn't there in the deed with the New
5 York Central the language, "subject to any agreements for
6 location and use of fiber optic cable conduit and related
7 facilities in, on or along a portion of the premises"?

8 MR. WELLINGTON: In some deeds, your Honor, that
9 language exist, in other deeds -- there are many, many, many
10 deeds and in other deeds it doesn't exist. It's another
11 issue for the Board.

12 THE COURT: Why is that an issue for the Board?

13 MR. WELLINGTON: Well, let me get to that, if I can,
14 your Honor --

15 THE COURT: Yes, I'm sorry, I --

16 MR. WELLINGTON: -- because it's part of a bigger --

17 THE COURT: I don't mean to interrupt your argument,
18 but I just wanted you to know in advance what my problems
19 were, so you could deal with them in context.

20 MR. WELLINGTON: Well, it's part of the issue for
21 the Board, your Honor, because fundamentally the contracts at

22 issue here between -- excuse me, the license agreement
23 between Conrail and AT&T, that license agreement has been
24 impacted by a Board-approved transaction; no one can dispute

11

1 that, AT&T can't, we can't. The question then becomes --

2 THE COURT: It has been impacted because, I'll call
3 them the transferees have concluded that it should be
4 impacted and it doesn't necessarily -- it wouldn't
5 necessarily be impacted, would it? In other words, why
6 couldn't the New York Central and the other transferees
7 simply say, yeah, we're going to continue to abide by the
8 most-favored-nations clause?

9 MR. WELLINGTON: Well, the Board, which has the
10 exclusive jurisdiction given to it by Congress to determine
11 the appropriate competitive and anti-competitive natures of a
12 rail merger --

13 THE COURT: Right.

14 MR. WELLINGTON: -- has concluded that various parts
15 of that right-of-way go to NS, various parts of that right-
16 of-way go to CSX --

17 THE COURT: Right.

18 MR. WELLINGTON: -- that board has set the terms.

19 THE COURT: But the Board never expressly found that
20 the most-favored-nations provision would no longer be
21 effective, did it?

22 MR. WELLINGTON: It hasn't because -- there was no
23 specific holding on that, your Honor, because in fact that
24 was not raised by any party before the Board and, hence, now
25 that it has been raised, as an inherent part of that

1 transaction it is for the Board to address that and that's
2 all we are saying.

3 THE COURT: Did AT&T have notice of the Board
4 proceeding?

5 MR. WELLINGTON: Absolutely, your Honor, it was a
6 public -- not only is it publicly noticed, as required, but
7 160 other people who had contracts like these and other
8 interests all appeared and testified and had their
9 opportunity to --

10 THE COURT: AT&T didn't appear?

11 MR. WELLINGTON: AT&T did not intervene. And in
12 fact they were in negotiations with Conrail during this whole
13 period of time to renew the license agreement, which they
14 did. So, AT&T was aware of it, they just -- they made
15 whatever decision, they did not intervene to try to protect
16 themselves in ways that they now feel they should, they
17 waited four years afterward and filed this lawsuit.

18 THE COURT: I'm sure they'll have an explanation,
19 but I'll wait, I'll restrain myself and wait.

20 (Laughter.)

21 THE COURT: Go ahead, I'm sorry.

22 MR. WELLINGTON: Your Honor has raised a number --
23 of what will ultimately be appropriate questions on the
24 merits of the impact of that transaction on the MFN. What
25 Conrail's motion, partial motion or motion for partial relief

1 is about is that we believe fundamentally the law is
2 absolutely clear, both from the statute and from the case
3 law, that that decision is for the Board. And I just want to
4 walk -- I'm going to be briefer than I usually am arguing,
5 your Honor, I hope, and the other thing I'm going to do is
6 I'm probably going to quote from a couple of cases more
7 frequently than I would. But the law is so clear on this
8 that I think if we can just direct your Honor to --

9 THE COURT: I always beware when somebody tells me
10 how clear the law is.

11 MR. WELLINGTON: Well, Mr. Higgins might muddy it up
12 a little bit, but I'll try to respond and rely, if I can.

13 First of all, the issue -- again, we've talked a
14 little bit, your Honor and I, about the merits versus the
15 jurisdiction issue and I want to reiterate this again: The
16 Conrail motion does not raise any issue requiring this Court
17 now, in our view, to address the merits of whether AT&T is
18 entitled to recover from Conrail for the MFN violation. Our
19 motion is limited to whether the STB, the Surface
20 Transportation Board, or this Court has jurisdiction to
21 determine whether AT&T's allegations of Conrail liability
22 post-split date are preempted by Decision 89, which
23 authorized that transaction and in fact required the
24 conveyance of the right-of-way, which we're now trying to be
25 held liable for, after that date. Either --

□

1 THE COURT: I'm sorry again to interrupt you, but is
2 it your view that that decision necessarily affected AT&T's

3 rights to enforce its most-favored-nations provision?

4 MR. WELLINGTON: It --

5 THE COURT: I mean, couldn't -- wouldn't -- why
6 wouldn't they have the right to believe that that was one of
7 the contracts that would be recognized and lived up to by
8 Conrail or by Conrail's successor?

9 MR. WELLINGTON: I'll answer the first -- my first
10 answer to your first question, your Honor, is do we believe
11 -- yes, we do believe that the contract, that that contract,
12 the license agreement, has been impacted by the approved
13 transaction. That, again, is a merits issue --

14 THE COURT: Why is it --

15 MR. WELLINGTON: -- for the Board to decide. I'm
16 sorry.

17 THE COURT: Why is it necessarily impacted? I mean,
18 it's impacted to the extent that obviously the new owner of
19 the right-of-way would be performing rather than Conrail, but
20 why is it necessarily impacted in whether or not it will be
21 performed at all by anyone?

22 MR. WELLINGTON: Well, it is impacted because
23 Conrail is incapable as a result of that transaction approved
24 by the Board of in fact assuring compliance with the MFN on
25 the right-of-way that's been transferred, that's why it's

□

15

1 been impacted --

2 THE COURT: Yes, Conrail --

3 MR. WELLINGTON: -- Conrail can't do that.

4 THE COURT: -- Conrail can't, but its successor
5 could.

6 MR. WELLINGTON: Well, it -- maybe, maybe not, your
7 Honor, I don't know. Those successors are not parties to
8 this litigation, they have not been sued by AT&T; whether
9 AT&T can hold them responsible is another issue, but they're
10 not -- I'm represent Conrail, the only party AT&T has sued,
11 and Conrail has been rendered incapable of in fact complying
12 with that because it's had to give that property up, it can't
13 control the property.

14 THE COURT: Well, Conrail wasn't an innocent
15 bystander, Conrail chose to make itself incapable of
16 performing.

17 MR. WELLINGTON: I think, your Honor, if you look--
18 if you read Decision 89 from the Board, in essence this was a
19 takeover of Conrail by CSX and NS, and ultimately the Board
20 made decisions, as it has the exclusive authority to make,
21 how that takeover was going to happen in a way that preserved
22 competitive -- the competition of railroads in the Eastern
23 sector. Conrail, as a result, was ordered to keep some
24 things, it was ordered to give up 90 percent of its rail
25 assets, there were certain retained assets and shared assets

0

16

1 the Board decided it needed to leave with Conrail in order to
2 assure that there was remaining competition, but that was --
3 this was not a Conrail scheme that was put together, this was
4 basically a hostile takeover that ended up with the Board
5 figuring out how to do it.

6 Now, again, all of that, in our view -- and
7 contracts were affected by those, not just AT&T's, hundreds
8 of contracts were affected by this transaction. And the

7-10-03.txt

9 issue -- you know, I think the most pertinent decision here
10 that we need to look at is a decision in Consolidation Coal
11 that the Board decided a year or so ago, which is -- involves
12 another competitive clause in another contract, that was sent
13 down by Chief Judge Giles to the Board in order to get -- for
14 it to determine whether or not the contracts there were
15 impacted. And the -- and let me talk about Consolidation
16 Coal for a moment and then back up to why this case fits
17 within it.

18 In Consolidation Coal, the contract -- there were
19 two contracts at issue there, but the one most similar to
20 this and it's virtually identi -- very similar to this, your
21 Honor, is that -- and I quote from Consolidation Coal --
22 "Conrail" -- there's a contract at issue and the court
23 describes it or the Board describes it, "Conrail would not
24 establish any rates or enter into any contracts involving the
25 line-haul movement of coal to the Baltimore area that placed

□

17

1 Consolidation Coal's terminal at a competitive disadvantage,"
2 paren, "(the competition provision)," paren, unquote.

3 In short, there was a competitive protection clause
4 in the contract like there was an MFN clause here.
5 Consolidation Coal comes to court saying, hey, give us
6 damages, Conrail, because you don't have this -- you know,
7 that clause is -- you took that clause away from us.

8 There was also another contract at issue in that
9 case where it was a take-or-pay, either give us \$4 million of
10 business a year or pay us \$4 million. Once Conrail was --
11 those contracts were removed from Conrail, Consolidation Coal

12 says, pay us \$4 million a year. Judge Giles, Chief Judge
13 Giles, in consent with the parties, sent that down to the
14 Board. And the Board in that case -- two important holdings,
15 your Honor: "The preemption of all other law extends not
16 only to laws, but also to contracts as necessary to let a
17 person participating in a Board-approved transaction carry
18 out the approved transaction."

19 And then it says, "CCSC contends that preemption of
20 the agreements is not necessary to this CSX-NSCRC transaction
21 and that enforcement of the agreements would not unravel the
22 transaction."

23 That's essentially the argument that AT&T makes
24 here, but the Board goes on: "But the necessity test does
25 not require a finding that the merger could not go forward

□

18

1 without the assignment of the agreements, only that there is
2 a nexus between the parties' assignments of the prior Conrail
3 contracts generally and the effectuation of the benefits
4 intended to result from the transaction. Here the division
5 of Conrail's assets between NS and CSX and the corresponding
6 assignment of Conrail's contractual obligations related to
7 those assets was inherently necessary for the parties to
8 carry out the pro-competitive transaction that we
9 authorized," end quote.

10 That is precisely what happened here. The Board
11 made that decision with respect to this contract, along with
12 many others. The impact of that is for the Board to decide
13 and you -- and the basis of that, you go back to the basic
14 jurisdiction in 48 USC 1331, which your Honor, I know, knows

7-10-03.txt

15 is -- says that the authority of the Board for mergers is
16 exclusive, and you then start with the Dispatchers case from
17 Justice Kennedy's quote in the U.S. Supreme Court that, you
18 know, making clear that it's exclusive; the Ninth Circuit,
19 which really rendered the first decision following that of
20 the Supreme Court case of import in the Railway Labor
21 Executives, holds that "the ICC," now the STB, "has exclusive
22 authority to challenge claims that certain proposed actions
23 are incident to the merger; the Fourth Circuit in Norfolk and
24 Western followed that; and then the Third Circuit in both
25 Pennsylvania v. the STB and the Union Railroad v. United

□

19

1 Steelworkers of America cited those cases from the Fourth and
2 Ninth Circuit in finding that the Board has exclusive
3 jurisdiction.

4 But what I suggest to the Court as the practical
5 thing to do is -- and let's look at the status of what's
6 happened. This complaint was filed in January of this year,
7 about four years after the transaction was approved by the
8 Board, Conrail filed this motion and on the same day filed a
9 petition with the STB, asking the STB to resolve these
10 issues, that petition is pending and has been fully briefed
11 by both sides. Subsequent to that petition -- this is a
12 matter of public record -- there's a petition before the
13 Board by NS and CSX to become the direct owners of the
14 originally-ordered subsidiaries of Conrail, NYC and PRR, and
15 yesterday the STB ordered that proceeding to go forward. So
16 that in fact, absent some objection, which seems unlikely,
17 the subsidiaries, NYC and PRR, for which -- whose actions

18 AT&T wants to hold Conrail liable in damages, are in fact
19 going to be separately and completely owned by other
20 corporations, not by Conrail anymore, that's the way this
21 transaction is involving, at least that issue is before the
22 Board to decide, again.

23 So, this Court, in our view, is -- the Board has
24 exclusive jurisdiction to decide the impact of that
25 transaction on the license agreement; Conrail may be right,

□

20

1 it may be wrong about the impact, but that's for the Board to
2 decide. This Court can either dismiss that portion of the
3 case or it can refer, as Chief Judge Giles did, a portion of
4 the case and stay this case until a decision from the Board
5 is rendered on that issue, because there are clearly other
6 issues from 1984 up to 1991 that are clearly before -- as to
7 whether or not Conrail violated that MFN which are
8 appropriately before this Court. And the Court, as other
9 courts have done, could even request that the Board give a
10 status report or respond to the referral within 120 days or
11 something, so that things are not stayed terribly long. But,
12 again, AT&T waited almost four years to bring the case,
13 waiting another four or five months for the Board to decide
14 that portion of it and then having that issue come back to
15 this Court and moving the case forward with the decision of
16 the Board on its exclusive jurisdiction issues in place I
17 think would be both the right thing to do as a matter of law
18 and the most efficient thing to do.

19 With that, I will sit down.

20 THE COURT: Well, let me just ask you this. Again,

7-10-03.txt

21 I'm concerned about the -- although I don't think it's
22 specifically been raised -- the constitutionality of a law
23 that gives a board the right to say, AT&T, the contract that
24 you had and that's been enforced for years is no longer going
25 to be enforced, it's standing in the way of a transaction

□

21

1 that we feel is in the best interest of the public and,
2 therefore, without any compensation or any consideration to
3 you, tough luck. Is that -- am I overstating that?

4 MR. WELLINGTON: Well, your Honor, two responses to
5 it: The statute passed by Congress, 49 Section 13 -- 11 --
6 11321 says, "a rail carrier corporation or person
7 participating in that approved or exempted transaction is
8 exempt from the antitrust laws and from all other law,
9 including state and municipal law."

10 THE COURT: Right, I can understand that.

11 MR. WELLINGTON: In Dispatchers, the Dispatchers
12 case, Justice Kennedy -- actually, it was a 7-to-2 opinion,
13 no one had any problem with the fact that all other law meant
14 all other law --

15 THE COURT: Including contracts?

16 MR. WELLINGTON: Including contracts. And --

17 THE COURT: Well, did anybody raise the issue of
18 whether you could just take and --

19 MR. WELLINGTON: And the Ninth Circuit, the Fourth
20 Circuit, the Third Circuit, the 11th Circuit have interpreted
21 this many times. I think the short answer -- and I can't
22 represent whether anyone has ever raised that -- no court in
23 affirming in fact this exclusive jurisdiction and the power

24 to abrogate contracts has ever suggested there's a
25 constitutionality issue, your Honor, not the Fourth Circuit,

□

22

1 not the 11th --

2 THE COURT: Maybe I'm way off base, but it just
3 seems to me --

4 MR. WELLINGTON: Well, we've had five circuits
5 affirm the power to do that.

6 THE COURT: That's -- that's -- that's persuasive,
7 but not conclusive, at least --

8 MR. WELLINGTON: And --

9 THE COURT: -- at least in my mind.

10 MR. WELLINGTON: -- and the Supreme Court.

11 THE COURT: I may have to follow what they've done,
12 but --

13 (Laughter.)

14 THE COURT: -- it still gnaws at me to think that--
15 you know, I was brought up to think of -- consider the
16 sanctity of contracts and that you can't just abrogate them
17 without some consideration, without some compensation.

18 MR. WELLINGTON: The -- I think --

19 THE COURT: You can abrogate them, I mean, there's
20 no question about that.

21 MR. WELLINGTON: The due process is that anyone has
22 the power to come into these proceedings and have their
23 rights considered by the Board. And the Board often, as a
24 result, in many of these proceedings has responded to those
25 concerns, issued certain protections. In the labor area

□

1 there's an established, you know, process for the termination
2 of employee rights, the need to follow the New York Dock
3 procedures. So, there has been an effort by the Board to
4 respond to issues that are appropriately raised, but at some
5 point the power -- the commerce clause power of the
6 Constitution, which has been delegated for rail-merger
7 purposes to the Surface Transportation Board, has been deemed
8 to have that power and no one -- no court has questioned that
9 so far, your Honor.

10 THE COURT: I should have been the lawyer in the
11 case.

12 (Laughter.)

13 MR. WELLINGTON: Thank you, your Honor.

14 THE COURT: Thank you.

15 Yes, sir?

16 MR. HIGGINS: Thank you, your Honor.

17 THE COURT: Good morning.

18 MR. HIGGINS: Good morning, your Honor, may it
19 please the Court.

20 I have here, if your Honor please, a whole series of
21 prepared remarks, but it seems to me in light of the Court's
22 questions, if you'll permit me, the most efficient way to
23 proceed may well be to go to the Court's questions, which
24 frankly and with all deference to counsel, I don't think were
25 answered in the course of his remarks and I think are

0

1 dispositive of the matter before your Honor.

7-10-03.txt

2 Let me start with the first one, which isn't in the
3 briefs, and that is, what about the constitutionally
4 protected right to contract? What's going on here?

5 THE COURT: That's --

6 MR. HIGGINS: Exactly.

7 THE COURT: -- something that concerns me.

8 MR. HIGGINS: Now, when your Honor says, can you
9 really take away someone's contract rights without
10 compensation? That wasn't briefed before, your Honor. I
11 think the answer to that question, as your Honor does, is no,
12 you can't just take away somebody's contract rights without
13 compensation, if compensation is appropriate. We didn't get
14 to that in this case because it doesn't -- it, frankly, ought
15 not to be raised by the case.

16 It ought not to be raised by the case because we get
17 to the Court's second question, which is, how could you take
18 away any contract rights which people have unless you --
19 without any compensation, how could you take them away at
20 all? And the answer to that, if the Court please, is you can
21 take them away -- putting the compensation question aside
22 now, I'll come back to that -- you can take the rights away,
23 provided you have a very good reason. What's the very good
24 reason? Well, the very good reason has to exist obviously in
25 a statute passed by the Congress and the Congress passed a

0

25

1 statute in this -- that relates to this case. And the
2 portion of the statute on which Conrail relies is Section
3 11321 of what is I guess the Interstate Commerce Act, the
4 Surface Transportation Board Act. But that statute doesn't

7-10-03.txt

5 say you can just obliterate people's contract rights if you
6 feel like it, just because there's some big relationship
7 between the contracts in question and the merger
8 consolidation that's been approved by the Board. It says
9 right on its face, if the Court please, "a rail carrier
10 participating in an approved transaction," like this one, "is
11 exempt from antitrust laws and all other laws," and we would
12 concede that includes contracts, "as necessary to let the
13 rail carrier carry out the approved transaction." Not just
14 for any reason, only if it would pose an obstacle to the
15 approved transaction such that the transportation policy of
16 the United States can't be properly complied with.

17 That brings me to, your Honor -- that led right to
18 your Honor's second question, which was, assuming that
19 Conrail would be required to pay damages -- and I should
20 stress at this point, if your Honor will permit me to
21 digress, the only relief that AT&T seeks in this case is for
22 Conrail to reduce, where appropriate, the fees that it's
23 charging us, the \$17 million a year we've been paying for
24 years, to the extent that our competitors are paying less,
25 and we don't care who's charging them less. I want to make

□

26

1 absolutely clear, we don't challenge any aspect of the STB
2 transaction, we don't challenge the right of Conrail's
3 subsidiaries to enter into any contract they want, we don't
4 claim that no matter what contract they enter into that
5 constitutes a breach for Conrail, that's not the case at all,
6 they can enter any contract they want; it has to be approved
7 by Conrail's owners, who ultimately get the \$17 million, but

8 they can enter any contract they want. The breach only
9 occurs if Conrail decides that, notwithstanding its promise
10 in the MFN provision, it's not going to reduce the fees that
11 AT&T has to pay.

12 Now, the Court --

13 THE COURT: Well, can Conrail reduce the fees if it
14 no longer owns the right-of-way? I mean, isn't it impossible
15 for them to comply then and perform, at least --

16 MR. HIGGINS: No.

17 THE COURT: -- with regard to some of it?

18 MR. HIGGINS: What it owns, if the Court please, is
19 the license agreement. As part and parcel, as part and
20 parcel of the transaction which was approved by the STB,
21 Conrail said, well, we're going to give a C right-of-way
22 under certain conditions -- and I'd like to come back to
23 those conditions -- but we are going to keep our license
24 agreement with AT&T. It's not surprising, we've paid them
25 \$200 million and we're still paying them 17 million a year.

□

27

1 So they say, you go run the railroad, we'll keep the license
2 agreement with AT&T. They wrote quit claim -- and all we ask
3 -- you say, can they comply, if the Court please? All they
4 have to do is reduce the fees that we're being charged.

5 THE COURT: So, the fees are still being paid to
6 Conrail and not to the successors?

7 MR. HIGGINS: Yes, sir, absolutely, paid to Conrail.

8 And the --

9 THE COURT: Well, stop.

10 Mr. Wellington, I know this is a little out of order
Page 24

7-10-03.txt

11 here, but if you're still receiving the license fees and in
12 effect the contract -- the license agreement is still in
13 effect, why is it impossible for you to perform?

14 MR. WELLINGTON: Conrail is receiving the fees on
15 that portion of the right-of-way that was not just NS or not
16 just CSX, but where the cable is on both NS and CSX, and that
17 was part of the pro-competitive decision of the Board not to
18 have that right-of-way given to either of those. So, the
19 order was that Conrail -- I mean, AT&T is continuing to pay
20 for its access to right-of-way, that money is coming to
21 Conrail. Now, why can't Conrail --

22 THE COURT: For 2700 miles of --

23 MR. WELLINGTON: Yes, yes.

24 THE COURT: So, you're still receiving the license
25 fees for 2700 miles?

□

28

1 MR. WELLINGTON: Yes.

2 THE COURT: And that's all AT&T has?

3 MR. WELLINGTON: In essence. I think -- I don't
4 think we're receiving it for all of the 2700 --

5 COUNSEL: Yes, your Honor, yes.

6 MR. WELLINGTON: Okay, thank you. My prior
7 representation was correct.

8 THE COURT: I'm often guilty of oversimplification,
9 but if you're still receiving -- if you're still receiving
10 the payment under the contract of all the license fees for
11 the 2700 miles of fiber optic cable and if the new owners of
12 the right-of-way are -- and these are big ifs, but if they
13 are charging less than what AT&T is paying, then why can't

14 you reduce the amount that AT&T needs to pay you?

15 MR. WELLINGTON: The... we have been ordered to
16 convey that property, we no longer have any power over --

17 THE COURT: Forget whether you have power over what
18 they charge, let's just assume that they willy-nilly, for
19 whatever reason, decide to charge half of what AT&T is paying
20 -- I'm picking a number right out of the air -- but you're
21 still receiving the fees from AT&T, so AT&T and your license
22 agreement is still in effect.

23 MR. WELLINGTON: Correct.

24 THE COURT: AT&T is not paying the new owners --

25 MR. WELLINGTON: Correct.

0

29

1 THE COURT: -- they're paying you?

2 MR. WELLINGTON: Correct.

3 THE COURT: So, why isn't your most-favored-nations
4 provision still in effect?

5 MR. WELLINGTON: Your Honor, it may or may not be,
6 and that's what I've said from the beginning, that is a
7 decision for the Board.

8 THE COURT: Why?

9 MR. WELLINGTON: Because it is -- this contract and
10 this required conveyance, just like in Consolidation Coal, is
11 an inherent part of what the Board ordered. The law is
12 absolutely clear from the cases we've talked about that the
13 board has exclusive jurisdiction to determine the impact of
14 what it has approved and, if the Board makes a mistake, it's
15 appealable.

16 THE COURT: Yeah, but as I'm -- and, again, I've got
Page 26

7-10-03.txt

17 to think about this, but -- and I admit a propensity to
18 oversimplify, but it seems to me that what the Board approved
19 was a transfer of the property of the right-of-way but didn't
20 transfer the license agreement that gave Conrail the right to
21 receive the license fees for the 2700 miles of fiber optic
22 cable.

23 MR. WELLINGTON: That's correct.

24 THE COURT: And it seems to me the amount of money
25 that is being paid by AT&T to Conrail is inextricably

0

30

1 intertwined with the most-favored-nations provision if its
2 competitors -- its competitors -- are paying less now to your
3 successors, for whatever reason -- it wasn't part of the
4 transaction approved by the Surface Transportation Board that
5 the new owners would charge less.

6 MR. WELLINGTON: Absolutely, your Honor, and here's
7 the --

8 THE COURT: That's their decision, if they've done,
9 I mean, we don't -- that's not before us at the moment.

10 MR. WELLINGTON: It was part of the Surface
11 Transportation's need to make sure there was competition to
12 assure that the new owners had the right to charge whatever
13 they wanted to, that's part of the --

14 THE COURT: Right, they can charge whatever they
15 want --

16 MR. WELLINGTON: That's --

17 THE COURT: -- however, that might affect Conrail's
18 right to receive the full amount regardless of the most-
19 favored-nations clause.

Page 27

20 MR. WELLINGTON: Your Honor, think again about CCSC,
21 the Consolidation Coal, and the similarity here. where
22 Conrail had a contract with Consolidation Coal that obligated
23 it to pay \$4 million a year if it didn't give enough traffic
24 there and obligated it not to divert coal out of that area,
25 those contracts were terminated.

□

31

1 THE COURT: But, see, that contract couldn't be
2 performed, this contract could be performed, as I see it.
3 There's nothing stopping Conrail from performing its part of
4 the license agreement that it retained. It seems to me that,
5 from what I understand, if I understand the facts correctly,
6 Conrail retained the license agreement contract --

7 MR. WELLINGTON: Correct.

8 THE COURT: -- Conrail is continuing to get the full
9 benefit of that contract, but yet -- wants to receive, on the
10 one hand, the full benefit, but doesn't want to perform an
11 aspect of the contract that it fully is able to perform. You
12 can't stop -- I mean, there are certain things that AT&T -- I
13 understand there's alternative relief asked for, which
14 perhaps they can't get because you can't supply it, but you
15 certainly could supply reducing the fees that AT&T is paying
16 if they're able to establish that its competitors are paying
17 less as contemplated by this license agreement, as I see it.

18 MR. WELLINGTON: I want to -- without conceding, I
19 want to assume that for a moment, your Honor, that you're
20 right about that. The issue before your Honor is not whether
21 that is right or wrong, the issue is who decides it.

22 THE COURT: The issue is who should decide it.

23 MR. WELLINGTON: And, again, let us -- the precise
24 question --
25 THE COURT: But let me ask you something --

0

32

1 MR. WELLINGTON: -- who is to decide?
2 THE COURT: Well, who is to -- but let me ask you a
3 question: Let's assume I decide it, how is that going to
4 affect the transaction, if at all, approved by the Surface
5 Transportation Board? It's not going to -- as I see it, it
6 won't affect the transaction at all. How will it affect it?
7 MR. WELLINGTON: Your Honor, with all due respect,
8 the Court is --
9 THE COURT: Uh-oh, I'm in real trouble now.
10 (Laughter.)
11 THE COURT: Whenever anyone starts a statement, with
12 all due respect --
13 (Laughter.)
14 MR. WELLINGTON: You're in the process of
15 substituting the Court's judgment for the competitive
16 balances that it worked very hard to achieve, the economic
17 balances.
18 THE COURT: Well, AT&T is not in the railroad
19 business, right?
20 MR. WELLINGTON: Neither was Consolidation Coal,
21 your Honor, neither were suppliers, other suppliers.
22 THE COURT: Yeah, but in the Consolidation Coal
23 situation there was no way that they could have continued to
24 perform that contract. But here, it seems to me, it's very
25 simple to continue performing your obliga -- so long as you

1 want to continue getting the full amount of the license fee,
2 why shouldn't you be held responsible for the other
3 obligations?

4 MR. WELLINGTON: It can -- Conrail can continue to
5 fulfill all of the obligations in the sense of the right-of-
6 way is there, I mean -- let me take -- that's not the way --
7 that's not what I wanted to say.

8 Conrail cannot influence the new owners of the
9 right-of-way.

10 THE COURT: What if the new owners said, AT&T, we're
11 going to abrogate your right to use the fiber optic cable
12 right-of-way? Go on. Do you think you would still be
13 entitled to receive the license fee from AT&T?

14 MR. WELLINGTON: No, it would not have -- there
15 would be nothing you would be paying for at that point, your
16 Honor. It's paying for access.

17 THE COURT: Right, it's paying for access to
18 something you don't own.

19 MR. WELLINGTON: That's correct.

20 THE COURT: That's gone.

21 MR. WELLINGTON: And that was a decision the Board
22 made --

23 THE COURT: The Board -- that's gone, I understand
24 that. And the right to control what others are charged for
25 the use of that right-of-way is gone --

1 MR. WELLINGTON: Correct.
2 THE COURT: -- you can't control that.
3 MR. WELLINGTON: Correct.
4 THE COURT: But you can control what you charge
5 AT&T.
6 MR. WELLINGTON: We can control what we charge AT&T.
7 THE COURT: Right. And one of the considerations of
8 what you charge AT&T is what AT&T's competitors are paying
9 for the very same service, as I understand the contract.
10 Isn't that right?
11 MR. WELLINGTON: One of the considerations that the
12 MFN clause had was per-mile fee.
13 THE COURT: Right. So, I mean, why should the MFN
14 clause be invalidated, is there a reason for it? Other than
15 Conrail would love to get -- continue to get the full amount
16 of the license agreement.
17 (Laughter.)
18 MR. WELLINGTON: It may or may not be, your Honor,
19 it may or may not be.
20 THE COURT: Well, is there a reason? What --
21 MR. WELLINGTON: It may or -- the reason is because
22 the contract has been removed from Conrail.
23 THE COURT: No, it hasn't.
24 MR. WELLINGTON: The ability -- let me -- we're
25 going over the same ground, as you know, your Honor -- the

□

1 ability of Conrail to enforce the MFN clause has been
2 removed.

3 THE COURT: No, it hasn't, because the alternative
 4 was to reduce AT&T's -- the amount that AT&T pays. It's
 5 true, you can't -- I assume, for the purpose of this argument
 6 at least, that you can't control what the successors charge
 7 for the use of the fiber optic cable right-of-way, but you
 8 certainly can control what AT&T pays you. And one of the
 9 provisions of what AT&T owes to you was that if its
 10 competitors were to pay less for the use of the fiber optic
 11 cable right-of-way, one of the alternatives would be -- not
 12 just that you would raise it or stop it, but that you would
 13 lower what they pay.

14 MR. WELLINGTON: And the question --

15 THE COURT: And you can do that.

16 MR. WELLINGTON: And the question is whether the
 17 statute that gives the Board exclusive jurisdiction over
 18 setting up this transaction preempts that claim by AT&T, that
 19 is the question, your Honor.

20 THE COURT: But why would it if it doesn't affect
 21 the -- if it doesn't affect the transaction?

22 MR. WELLINGTON: It does affect the transaction,
 23 your Honor.

24 THE COURT: How does it affect the transaction?

25 MR. WELLINGTON: It's inherent -- if you, again,

□

1 read carefully the language of CCSC --

2 THE COURT: Yeah, I'm slow, so you --

3 MR. WELLINGTON: -- it's an inherent part of this
 4 transaction. Again, these two entities --

5 THE COURT: You told me that the most-favored-

6 nations clause is one of, you know, pages and pages and pages
7 and pages of a contract --

8 MR. WELLINGTON: It's a 60-page license agreement,
9 that's correct.

10 THE COURT: Right. So, you were saying it's not at
11 all critical.

12 MR. WELLINGTON: Oh, I think it's a very important
13 clause, but it's not -- was not the quid pro quo for which
14 AT&T paid \$17 million a year, it paid it for access.

15 THE COURT: Access, yes, but -- but, by the same
16 token, they negotiated and got the right, if its competitors
17 were paying less, to pay less. Isn't that right?

18 MR. WELLINGTON: I'm sorry, your Honor, I just
19 missed that. I apologize.

20 THE COURT: They negotiated and received an
21 assurance that if their competitors were paying less for the
22 use of the same fiber optic cable right-of-way that their
23 rent, so to speak, or their whatever, their license fee or
24 whatever it is, would be reduced proportionately?

25 MR. WELLINGTON: That's what they would hope out of

□

37

1 the -- a little abbreviated, but that's what they would hope,
2 yes.

3 THE COURT: Right.

4 MR. WELLINGTON: Mm-hmm.

5 THE COURT: And, again, I may be oversimplifying,
6 but I don't see how that affects the transaction that was
7 approved by the Surface Transportation Board. I mean, it
8 certainly doesn't affect anything that the successor

9 companies receive for their license agreements with others
10 for the fiber optic cable right-of-way, they get whatever
11 they want to get, they're perfectly free to do that, right?

12 MR. WELLINGTON: Yes.

13 THE COURT: The only one it affects is Conrail --

14 MR. WELLINGTON: Yes.

15 THE COURT: -- or the only one it could affect is
16 Conrail -- and Conrail made that bargain; it doesn't want to
17 live up to its bargain.

18 MR. WELLINGTON: AT&T and Conrail made that bargain,
19 your Honor, and the issue is does the fact that this
20 conveyance, which no longer permits Conrail to have control
21 over that MFN, permit AT&T, nonetheless, to sue Conrail for
22 it.

23 THE COURT: Well, they shouldn't have to sue.

24 MR. WELLINGTON: In our view, it is --

25 THE COURT: It seems to me that the contract says,

0

38

1 if their competitors are paying less, they should pay less,
2 and if they're continuing -- the relationship continues with
3 Conrail, not with the successors, is that right?

4 MR. HIGGINS: That's exactly right, your Honor. We
5 don't have any -- we aren't quarreling with the successors,
6 we have no complaint about the successors, they can do
7 anything they want. But in a very, very competitive industry
8 we are paying \$17 million a year for this right-of-way and
9 Conrail's own papers show this Court that Quest, a principal
10 competitor, is paying zero.

11 THE COURT: Well, that's for in kind, isn't it?

7-10-03.txt

12 MR. HIGGINS: That's the point, that's exactly the
13 point. It was a barter contract, you're absolutely right,
14 your Honor, it was a barter contract in which Conrail said,
15 okay, we'll let you lease right-of-way, same as AT&T, instead
16 of taking money from you, we'll take services. Now, there's
17 a dispute between the parties about what the services cost to
18 Quest --

19 THE COURT: Are worth, yes.

20 MR. HIGGINS: -- what they're worth and what they
21 cost to Quest, we'll put that aside for a moment. Conrail
22 says, post-1999, we don't want to pay any attention to that
23 Quest contract. Why? Because Conrail is out of the -- in
24 the main, Conrail is out of the railroad business, they're in
25 the licensing business now, they're out of the railroad

□

39

1 business, so they don't need any services from Quest. So,
2 Quest pays zero, but Quest still has the fiber optic cable
3 lease and it uses that lease to compete with us, and we're
4 paying multi-million dollars every year and being placed at
5 that competitive disadvantage.

6 THE COURT: You don't claim that you can pay
7 nothing?

8 MR. HIGGINS: No, no, we should pay -- our fees
9 should be reduced on the same property as is being leased by
10 our competitors to the same extent. If in fact Quest is
11 paying zero, that's their choice, we should pay zero. If
12 Sprint is paying 90 percent of what we're paying, our fees
13 should be reduced ten percent. And --

14 THE COURT: I can see that, but I think you're

15 overreaching on the Quest thing.

16 MR. HIGGINS: If they pay zero, if your Honor
17 please, I'm not sure how. They're competing against us.

18 Look, we entered this contract in 1984, you know, it
19 was the first contract for leasing fiber optic cable --

20 THE COURT: Is Quest providing services for the
21 successor company?

22 MR. HIGGINS: No, sir, I don't think so, but if they
23 are -- I don't think so, but if they are -- and we've said
24 this in our papers -- they should get credit for that, I
25 agree with that. If they're providing service and spending

□

40

1 any money, whether it's by virtue of barter agreement or in
2 cash, they should get credit for that. All we want is an
3 even playing field, that's what we bargained for.

4 THE COURT: Well, let me ask -- who is recognizing
5 the contract with Quest and permitting them to continue
6 getting free fiber optic cable services?

7 MR. HIGGINS: Because Conrail kept the AT&T license
8 agreement expressly, I mean, in the --

9 THE COURT: Well, let me ask them, why are you --

10 MR. HIGGINS: -- and they kept the Quest agreement.

11 THE COURT: -- why are you giving Quest free
12 services, if you are?

13 MR. WELLINGTON: There was -- the contract between
14 Quest and Conrail was an access -- a capacity-for-access
15 contract and Conrail, as a result of this transaction, has
16 suffered as a result of the Board's decision in essence by
17 removing that right -- Conrail no longer, as a result of its

7-10-03.txt
18 reduction, has significant need for that capacity.
19 THE COURT: Right. So, why don't you just --
20 MR. WELLINGTON: In fact, one of --
21 THE COURT: -- tell Quest that you're not --
22 MR. WELLINGTON: Well, some of successors in fact
23 are using portions of it.
24 THE COURT: They are? Oh, okay.
25 MR. WELLINGTON: So that has moved on to CSX and NS

0

41

1 for their capacity use.
2 THE COURT: So that becomes a fact question as to
3 how much in effect they're paying?
4 MR. HIGGINS: Yes, your Honor. Whatever it costs
5 Quest, it costs Quest. We would claim that we're entitled to
6 have our fees reduced to whatever that cost is to Quest on
7 that particular piece of property, which I think in Quest's
8 case runs -- runs to several hundred miles.
9 THE COURT: It's not 2700 miles?
10 MR. HIGGINS: No, your Honor, it's not 2700 miles,
11 but I think it may be in the order of five or 600 miles or
12 maybe a quarter of the \$17 million a year. I mean, your
13 Honor has asked --
14 THE COURT: That's still big money.
15 MR. HIGGINS: I agree with your Honor, so does AT&T
16 in this day and age. It used to be the largest corporation
17 in the world, it's not that anymore, if the Court please, and
18 the competitive pressures, as you know just from the front
19 page of the newspapers, have been difficult.
20 THE COURT: I used to own AT&T stock, I confirmed

21 again this morning that I don't own any AT&T stock.

22 (Laughter.)

23 MR. HIGGINS: I think I'll stay away from that one,
24 your Honor.

25 THE COURT: It used to be that, you know, for your

□

42

1 kids, the safest thing in the world would be to buy AT&T
2 stock.

3 MR. HIGGINS: That's correct.

4 THE COURT: My mother did that or my parents did
5 that for me, but it didn't turn out that way.

6 MR. HIGGINS: If your Honor please, I'm going to
7 dispense with the absolutely prepared remarks that I made,
8 but I would like, around the edges at least, to --

9 THE COURT: Well, why don't we -- it seems to me we
10 boiled this down, unless Mr. Wellington can get me back into
11 line here, we boiled it down to a very simple proposition:
12 Conrail kept to itself the license agreement with AT&T, it's
13 getting all the benefits of the license agreement with AT&T;
14 it's true, it cannot control what AT&T is charged -- I'm
15 sorry, what AT&T's competitors are charged for the similar-
16 type services that would be covered by the most-favored-
17 nations clause, but if the fact is that AT&T's competitors
18 are paying less then why shouldn't AT&T pay Conrail less and
19 enforce the most-favored-nations clause?

20 MR. WELLINGTON: Your Honor, again I say, it may or
21 not, but that is a Board decision. And I'll just read you
22 two quotes from cases --

23 THE COURT: Go ahead --

7-10-03.txt

24 MR. WELLINGTON: -- that make it a Board decision.

25 THE COURT: -- I'd like to hear it.

0

43

1 MR. WELLINGTON: The Ninth Circuit, again, on the
2 Railway Labor Executives case, which the Third Circuit has
3 cited as authority here -- as with approval twice, the Ninth
4 Circuit acknowledged that the Supreme Court in Dispatchers
5 didn't decide who should make these determinations. And the
6 Ninth Circuit says, "who is it to decide? It follows from
7 the propositions that where a railroad which has been a party
8 to an ICC-approved merger claims that certain proposed
9 actions are incident to that merger and exempt from" -- in
10 this case it was RLA procedures, but it doesn't matter
11 because they're business and labor -- "the ICC has exclusive
12 authority to resolve a challenge to these claims."

13 THE COURT: Well, let me ask you --

14 MR. WELLINGTON: And then --

15 THE COURT: -- is it correct, is the statement
16 correct that Conrail is no longer in the railroad business?

17 MR. WELLINGTON: No, Conrail --

18 THE COURT: It's not correct or it's not --

19 MR. WELLINGTON: Conrail is in the railroad
20 business, it operates some interchanges, three yards, some
21 other...

22 MR. BRODER: 1300 miles.

23 MR. WELLINGTON: ... 1300 miles of railroad still.
24 I turned to Mr. Broder, who is general counsel for Conrail.
25 So, it is still in the railroad, in a much smaller way than

0

1 it was before. And the other --

2 THE COURT: Well, let me turn to your colleague then
3 and ask, if Conrail is still in the railroad business --

4 MR. HIGGINS: Yes, your Honor.

5 THE COURT: -- and if the result of this decision
6 would be for Conrail to receive less from AT&T, is that not a
7 matter then for the Board to decide?

8 MR. HIGGINS: No, your Honor. It's not a matter for
9 the Board to decide any more than it would be a matter for
10 the Board to decide whether Conrail ought to pay its electric
11 bill or whether Conrail ought to pay its gas bill. It's a
12 matter for this Court to decide in the first instance -- and
13 let me just spend a second on that. Counsel must have some
14 arguments that he intends to make before the Surface
15 Transportation Board that he wants to keep a secret from the
16 Court for some reason. You keep asking him, well, why can't
17 Conrail comply? How does this affect the transaction? And
18 the only answer I hear to that is, well, that's not for this
19 Court, that's for the Surface Transportation Board. That's
20 not correct. With all deference to counsel, it is
21 Jurisdiction 101, Chapter 1 of "Davis On Administrative Law,"
22 that a court always has, the district court always has
23 jurisdiction to decide its own jurisdiction. United
24 Mineworkers v. Gibbs decided that over 50 years ago, I'll bet
25 there are a half a dozen Supreme Court cases that enunciate

□

1 what I think is a very basic proposition. The case is here,
Page 40

2 it's not going anywhere else unless this Court decides it
3 should go somewhere else. Obviously, jurisdiction is for
4 your Honor to decide.

5 Your Honor asked at the very outset of this
6 discussion, assuming that Conrail was required to pay
7 damages, how would that affect the transaction with
8 sufficient materiality to require that the contract be
9 preempted? You've gotten no answer to that question. Our
10 contract has nothing to do with railroad operations, it has
11 simply to do with our contractual right to be put on a level
12 playing field with our competitors, as Conrail promised we
13 would be some \$200 million ago in 1984.

14 I want to spend a minute, if I may, your Honor, on
15 Conrail's ability to control what its subsidiaries do.

16 THE COURT: Okay, I'm going to take a five-minute
17 recess before we do that.

18 MR. HIGGINS: Sure.

19 (Court in recess.)

20 MR. HIGGINS: May I have just a minute, your Honor?

21 THE COURT: Sure.

22 MR. HIGGINS: Thank you, sir.

23 (Pause.)

24 THE COURT: I guess the question boils down to,
25 assuming that everything we have said so far is correct, why

□

1 is it not the Surface Transportation Board that decides it
2 rather than this Court?

3 MR. HIGGINS: Well, if your Honor please, as I said
4 before, a district court always has jurisdiction to decide

5 its own jurisdiction, that is United Mineworkers v. Gibbs in
6 the Supreme Court, that is United States v. Ruiz in the
7 Supreme Court, that is Basic Constitutional Law 101.

8 The question is, how does your Honor go about doing
9 that? Is there a reason for your Honor to decide that things
10 are so confusing that you need help? Your Honor doesn't
11 strike me as being the least bit confused with respect to
12 what's going on in this case or what the statute means.

13 THE COURT: My father always used to say, I'm not
14 always right, but I'm never in doubt. So...

15 (Laughter.)

16 MR. HIGGINS: I think my father said something like
17 that to me too, Judge. But, if the Court please, where the
18 Court has in front of it the statute, and the statute is
19 clear and the facts, and the facts seem clear or the facts
20 are such that the Court doesn't feel that it can benefit from
21 any analysis provided by experts in an agency, then the Court
22 should go ahead and decide. What we're saying --

23 THE COURT: Well, it seems to me that because
24 Conrail has retained the benefits of this contract and is in
25 a position to perform its obligations under the contract, at

0

1 least in part, some showing should be made as to how an
2 adverse decision would affect adversely the transaction
3 approved by the Surface Transportation Board in order to
4 recognize that the jurisdiction ought to give way to the
5 expertise and the administrative experience and expertise of
6 the Surface Transportation Board, and so far I haven't heard
7 a great deal about that.

8 MR. HIGGINS: well, your Honor is exactly correct
9 and that's exactly what the Supreme Court said in the
10 Dispatchers case, which counsel referred to, it's the leading
11 case in that area. And in that case at Page 134 -- this is
12 499 US 117 and 134 -- the court said in almost the same words
13 your Honor just used, quote, "The immunity provision," that
14 is this 11321 -- "does not exempt carriers from all law, but
15 rather from all law necessary to carry out an approved
16 transaction."

17 Your Honor keeps asking, well, why can't the
18 transaction go forward just because Conrail has to reduce its
19 fees? The only answer you've gotten to that is, well, that's
20 for the Surface Transportation Board. That's not accurate,
21 if the Court please, it's for this Court. It is not for us
22 to be delayed several years more traipsing off to the Surface
23 Transportation Board when this Court has before it the
24 statute and the fact that were paying a hundred cents on the
25 dollar and receiving far less than that. We had a promise

0

48

1 that we could not only lease the right-of-way, but that we
2 wouldn't wind up being at a competitive disadvantage because
3 our competitors were paying less. Quest, at least, is
4 clearly paying less. We have a right to that and it won't
5 interfere with this transaction whatsoever.

6 Your Honor said, well, yes, but isn't it true that
7 Conrail may make less money, doesn't that have some impact?
8 And I said, kind off the top of my head, well, they would
9 make less money if they had -- they would make more money if
10 they didn't have to pay their electric bill and so forth.

11 One of my colleagues handed me at the break -- reminded me at
12 the break that on Page 13 of our brief we quote a Fifth
13 Circuit case that deals with that precise question and says,
14 "no doubt the merged system would operate more efficiently
15 and free of burdens without the strictures of this
16 agreement," that they wanted to avoid, "but it would operate
17 more efficiently and free of burdens on interstate commerce
18 if it were relieved of its contractual obligations to pay its
19 debts on a bargained-for wage scale."

20 Congress allowed the ICC significant power to
21 effectuate approved transaction, but it did not authorize
22 gratuitous construction of contractual relations, even when
23 it serves the general public interest, when the destruction
24 is irrelevant to the success of the approved transactions.
25 This merger will go forward and the railroads will run as

□

49

1 they were run regardless of the level of fees that Conrail is
2 collecting.

3 But, if your Honor please, I can't leave this
4 argument without -- while, frankly, I don't think it is
5 necessary to your Honor's conclusion, A, that you have
6 jurisdiction and, B, that the case should stay here, I don't
7 want to leave it without at least touching on two points:
8 One, the extent to which Conrail has control, this third
9 party out here who's making all these decisions that may hurt
10 them and make them make less money; and, two, the notice that
11 we had.

12 With respect to the first, it isn't as though
13 Conrail is dealing with some competing railroad. Not only

7-10-03.txt

14 are the two subsidiaries which through operating agreements
15 can enter into these new fiber optic agreements with our
16 competitors, not only are they subsidiaries of Conrail's, but
17 the contracts have to be approved by the two sole
18 shareholders of Conrail, Norfolk Southern and CSX. They're
19 big boys, they are perfectly capable of deciding whether it's
20 in their financial interest to give discounts to other
21 carriers off what we pay, it may be five cases, it may be ten
22 cases, I have no idea, and then reduce the fees it gets from
23 us and still wind up ahead, that's for them to decide. It's
24 true Conrail doesn't directly control it, I'll tell you how
25 they indirectly control it, but it doesn't make much

0

50

1 difference because the two shareholders of Conrail do control
2 it and they can make their own decisions.

3 Second -- and your Honor asked this very early on
4 and nobody has ever come back to it -- the question I think
5 was, well, didn't the grant of this right-of-way to these
6 subsidiaries, wasn't that -- didn't that somehow take into
7 account this license agreement? The answer to that given to
8 you by counsel was, well, one deed did, but there are lots of
9 deeds. Well, if your Honor please, there are two deeds in
10 this record. There is the deed that we put in the record
11 attached to our motion and that deed said, on Page 3, among
12 other things, that Conrail was deeding the right-of-way" -- I
13 said Page 3, if the Court pleases, Page 2, and I -- is it
14 Exhibit 1 or 2 to our motion?

15 COUNSEL: I believe it is Exhibit 2.

16 MR. HIGGINS: Exhibit 2 to our motion, your Honor,
Page 45

17 Page 2.

18 (Pause.)

19 MR. HIGGINS: I would respectfully refer your Honor
20 to the paragraph third up from the bottom, beginning,
21 "Subject to" --

22 THE COURT: "Subject to"?

23 MR. HIGGINS: Yes, sir. And in particular, if the
24 Court please, to the paragraph labeled capital E.

25 THE COURT: Isn't that the one that I quoted from

0

51

1 earlier? Yes.

2 MR. HIGGINS: I think that's right, your Honor.

3 THE COURT: Yes.

4 MR. HIGGINS: And counsel said, well, that's just
5 one deed, there are lots of deeds. And, as I've just said to
6 the Court, well, there's only one other deed before the Court
7 and that's the one that Conrail, presumably after a great
8 deal of research, decided to put before the Court to explain
9 to you that, well, you really didn't have to pay attention to
10 the subject-to clause. But that deed, if the Court please,
11 which is an exhibit to Conrail's reply, has exactly, exactly
12 the same subject-to clause. Now, I don't know if some lawyer
13 didn't read far enough in the deed or what, but deeding the
14 right-of-way subject to the license agreement is language
15 which appears not only in the deed we put before the Court,
16 but also in the deed Conrail put before the Court.

17 Now, their point I think was, well, this deed of
18 right-of-way gave to the subsidiaries explicitly the right to
19 enter into new fiber optic cable agreements. That's true,

7-10-03.txt

20 but it gave them the right subject to the license agreement.
21 Now, what does that mean? It makes sense, doesn't it, that
22 Conrail would do it subject to the license agreement,
23 otherwise they could get in a lot of trouble. After all,
24 they have obligations to us as well. We can't have people
25 coming in, tearing up cable in a multi-billion-dollar

□

52

1 operation.
2 So, they say it's subject to the license agreement.
3 What does that mean? That means that the person taking the
4 right-of-way, which can lease to other carriers, can't do
5 anything inconsistent with the license agreement, that's what
6 "subject to" means. What does that mean? When Conrail says
7 to you in its papers, we not only don't have any control, we
8 don't even know what's in those agreements. Well, if the
9 recipients of the right-of-way get it subject to the license
10 agreement, doesn't it make sense that if Conrail calls them
11 up and says, I want to see those contracts to see how they
12 implicate my license agreement, that Conrail not only will
13 get them because they're their subsidiaries, but has a legal
14 right to get them? Because they've only deeded the right-of-
15 way subject to the license agreement which we've been talking
16 about here this morning.

17 Now, your Honor also asked -- well, you'd like to
18 hear what we had to say about notice. Your Honor's question
19 to counsel was, did AT&T have notice? You didn't get a
20 direct answer, if the Court please; the answer was, AT&T was
21 aware. Well, that may or may not be, Judge. I guess AT&T
22 could have read the New York Times, I guess they could have

23 some clerk that read the Federal Register everyday. We got
24 no notice of the proceeding, we got no formal notice because
25 there was no issue raised with respect to any of our

0

53

1 contracts. We didn't intervene, if we would have known,
2 because Conrail was keeping the license agreement and was
3 perfectly able to continue performing.

4 So that brings me full circle, if the Court please,
5 back to the question of jurisdiction, and I'll close on this
6 point -- except, obviously, to the extent that the Court has
7 questions. But counsel has said, well, you know, we've got
8 these cases in the Fourth Circuit, in the Ninth Circuit and
9 in the Third Circuit that say that jurisdiction in these
10 matters is for the STB. It's not what those cases say, if
11 the Court please.

12 Let me just talk about the Steelworkers case for a
13 second, in this circuit. In that case, the United States
14 Steelworkers Union filed a counterclaim in a case in the
15 district court and it said, you know, the railroad can't do
16 these things in connection with this merger, it can't change
17 things around, because we've got the Railway Labor Act to
18 protect us. And the district judge considered the statute,
19 considered the law and said, you know what? First of all, I
20 have jurisdiction to decide this -- he doesn't say that in
21 the opinion, but he decides the jurisdictional question, and
22 he decides it on the ground that -- which has been
23 universally affirmed in every one of their cases except
24 Consolidated Coal, which is a different kind of case -- he
25 said, look, if there's one thing that's clear, it's that if

1 you have a question whether the labor conditions imposed by
2 the Surface Transportation Board and the procedures pursuant
3 to them prevail or whether the Railway Labor Act provisions
4 prevail, that's a question for the Surface Transportation
5 Board, that's been universally held. We don't have that
6 situation here. It's been held by the Surface Transportation
7 Board that there is preemption in most of these cases
8 because, absent the Railway -- absent the labor-protective
9 provision that are imposed by the Board, the courts have
10 said, you know, the Railway Labor Act is going to prevent
11 this transaction from going forward, the mandatory
12 negotiating provisions of that statute and so forth take so
13 much time that we'll never get there, and so it's preempted,
14 we'll go with these labor-protective provisions. Congress
15 has done a good job of protecting the employees, that's what
16 all those cases are about.

17 So, it doesn't help them on jurisdiction who should
18 decide, the district court decided in every one of those
19 cases, and it doesn't help them on the merits because those
20 cases have nothing to do with the merits. Your Honor has
21 correctly analyzed this case: They can perform, they ought
22 to perform and, when they do perform, it will have absolutely
23 no impact, absolutely no impact on the consolidation that was
24 approved by the STB. This notion of sending it over to the
25 STB, with all deference to my learned colleague, is

1 calculated for one purpose only and that's delay. With all
2 respect, your Honor, we would ask your Honor not to permit
3 that.

4 (Pause.)

5 MR. WELLINGTON: May I have a brief response, your
6 Honor?

7 THE COURT: Of course, but before you do I'd like to
8 ask a question of Mr. Higgins.

9 In the complaint, in Paragraph 39(d), you claim that
10 Conrail has breached its expressed and implied duties under
11 the license agreement by transferring portions of the MFN-ROW
12 to its wholly-owned subsidiaries and then divesting itself of
13 the ability to perform its obligations under the MFN
14 contract. You don't really mean that, do you?

15 MR. HIGGINS: No. But it's an alternative pleading,
16 if the Court please. What we're saying -- and perhaps it
17 isn't artfully said there -- what we're saying is we think
18 Conrail can perform, we think they ought to perform. But if
19 the Court were to accept the proposition that the contract is
20 preempted, then the contract is preempted. If they can't
21 perform, we don't owe them 17 million a year.

22 There are cases, Consolidated Coal is this kind of
23 case, where the whole contract is preempted. Counsel said to
24 you, well, Consolidated -- Conrail in that case owed \$4
25 million a year to Consolidated Coal, but the court said you

□

1 don't have to pay that, that's true --

2 THE COURT: Yes, let me ask Mr. Wellington a

3 question: Do you contend that AT&T continues the obligation
4 to pay 17 million a year?

5 MR. WELLINGTON: Yes.

6 THE COURT: So that --

7 MR. WELLINGTON: Now, subject to the other claims
8 that they have made here that if in fact other existing --
9 any contracts that Conrail has entered into from 1984 to the
10 split date that this Court would find violates the MFN,
11 Conrail still has that obligation, in our view, going forward
12 -- right? We're not contending that. The only question is,
13 are we liable for something that new parties are doing on
14 that right-of-way that we don't have responsibility for or
15 control over?

16 So, we still have MFN obligations for that --
17 anything that we've entered into that continues beyond that
18 split date, and that is appropriate for this Court because
19 that is unrelated to the transaction.

20 THE COURT: You're saying that Conrail has no -- no
21 control over its subsidiaries?

22 MR. WELLINGTON: It has none, your Honor, that's
23 clear. It was set up that way for competitive purposes under
24 the -- in fact Conrail does not appoint the officers or
25 directors and this was a structure set up by -- and one of

□

57

1 the subsidiaries is controlled as an operating entity by
2 Norfolk Southern, the other one is controlled as an operating
3 entity by CSX, Conrail has no authority over either of them.
4 As I mentioned to the Court earlier, there is now a specific
5 petition that the Board is considering --

6 THE COURT: But your --

7 MR. WELLINGTON: -- they're going to become the
8 specific owners.

9 THE COURT: Your position, though, is that the
10 Surface Transportation Board in effect has the authority to
11 affirm or confirm parts of the contract and abrogate other
12 parts of the contract?

13 MR. WELLINGTON: It does, your Honor.

14 THE COURT: Maintaining the obligation of the other
15 contracting party to pay in full without receiving what it
16 bargained for?

17 MR. WELLINGTON: The Surface Transportation Board
18 has exclusive authority -- again, 11321 -- as necessary,
19 exempt from laws, any other law, necessary to carry out the
20 transaction; hold, maintain, operate property, exercise
21 control over franchises, et cetera, et cetera.

22 THE COURT: Without any consideration?

23 MR. WELLINGTON: Taking the hypothetical the way
24 you've said it, yes. There is -- there's not an absence of
25 consideration here, your Honor. AS I have indicated, AT&T

□

58

1 has 2700 miles of cable for which it is paying.

2 THE COURT: Yes, but it loses its right -- assuming
3 you're correct, it loses its right to its most-favored-
4 nations provision without being compensated for that.

5 MR. WELLINGTON: It loses the ability -- perhaps, if
6 we're right and the Board agrees with us, it loses its
7 ability to hold Conrail responsible in damages for a removal
8 of that contract right by the Board as part of this

7-10-03.txt

9 transaction from June 1st, 1999 going forward for contracts
10 that other people are entering into. We still know we have
11 the obligation for the MFN clause -- for example, worldcom,
12 worldcom put in their cable in 1990, they're still out there.
13 In 2003, if we are violating that most-favored-nations clause
14 in the worldcom agreement, we're not insulated from that.

15 THE COURT: Did you retain the Worldcom agreement?

16 MR. WELLINGTON: I think we retained all of them as
17 part of the transaction. And this is an important point,
18 your Honor, that --

19 THE COURT: So, what you're saying is only with
20 regard to those license agreements which you did not retain?

21 MR. WELLINGTON: Or if PRR, this new entity that the
22 Board created, enters into a license agreement with Adelphia
23 Communications, we are not liable for that, that's what we're
24 saying, we're not responsible -- we cannot have our
25 continuing agreement with AT&T going forward reduced, in

□

59

1 essence, pay damages to AT&T because an entity we don't
2 control after this Board approved it enters into a contract
3 that somebody says violates the MFN, that's what we say the
4 Board must opine on. We still have all of our obligations
5 going forward under that MFN clause for anything that was in
6 that ground at June 1, 1999, and there are a lot of them, and
7 this Court will decide whether or not we have violated it or
8 not violated it.

9 THE COURT: Okay. Mr. Wellington wanted to say
10 something more.

11 MR. WELLINGTON: I just -- I have -- part of what I

7-10-03.txt

12 wanted to say I've just said and there's just a couple of
13 other things, your Honor.

14 THE COURT: I need all the help I can get, so keep
15 going.

16 MR. WELLINGTON: Again, the Dispatchers case, I just
17 -- and it's a quote from Dispatchers, Justice Kennedy: This
18 preemption of all other law extends not only to laws, but
19 also to -- excuse me, I misstated that it's a quote, it's a
20 partial quote -- this preemption of all other law extends not
21 only to laws, but also to contracts as necessary to a person
22 participating in a Board-approved 49 USC 1321 transaction to
23 carry out the transaction.

24 In Railway Labor, the Ninth Circuit, again, cited
25 with approval by the Third Circuit twice, who is to decide?

□

60

1 It follows that the IC -- that where a railroad has been a
2 party to an ICC-approved merger, claims that are incident to
3 that merger and exempt from RLA procedures the ICC has
4 exclusive authority.

5 Under the Palestine case, the Fifth Circuit case, by
6 the way, that Mr. Higgins read to you from, it's essentially
7 been rejected by the 11th Circuit, which, as you know, has
8 assumed the responsibilities of the Fifth Circuit. It's a
9 '77 case, it's not been cited by anybody in years and its
10 reasoning was essentially rejected, and we pointed that out
11 in our reply brief.

12 But, your Honor, from CCSC, quote, "the assignment
13 of the agreements to PRR were not shams, they were rather
14 integral parts of a complex transaction that served to

7-10-03.txt

15 transfer approximately 58 percent of Conrail's assets into
16 the NS rail system. The division of Conrail's assets between
17 NS and CSX, and the corresponding assignment of Conrail's
18 contractual obligations related to those assets, was
19 inherently necessary for the parties to carry out the pro-
20 competitive transaction that we authorized." Your Honor,
21 that language is the Board itself stating that this decision,
22 Decision 89, and the division of Conrail's assets and the
23 assignment of Conrail's contractual obligations, was
24 inherently necessary to carry out this transaction. That
25 makes it, under the Board's own words, your Honor, absolutely

□

61

1 within their exclusive jurisdiction.

2 And, as we suggested, we're not proposing here to
3 delay anything. I suggested that -- I mean, they waited four
4 years to file the case, I suggested that the Court even ask
5 the Board to get back to the Court within that period of
6 time, 120 days or something, which some courts have done.

7 Just the last thing, your Honor, on the deed that
8 Mr. Higgins mentioned. No, I read it all the way through, I
9 didn't stop reading some other place. There's the language
10 that we pointed out in this deed, and there are many others
11 like it, that "the easement and right shall be exercised in a
12 manner which does not interfere with the railroad operations
13 or the safety of the grantee, or grantee's right to grant
14 other such nonexclusive easements or licenses with the
15 premises." In essence, there's a footnote that swallows up
16 that.

17 We just believe it's a jurisdiction issue for the

7-10-03.txt
18 Board, your Honor, and we'll be happy to -- you've already
19 heard my suggestion. Thank you.
20 THE COURT: Thank you.
21 Mr. Higgins?
22 MR. HIGGINS: Well, if your Honor please, I don't
23 want to unduly impose. I would like to spend a second on
24 this quote from --
25 THE COURT: Go ahead.

□

62

1 MR. HIGGINS: -- from Consolidated Coal. The quote
2 says -- and it's absolutely correct, was correctly quoted --
3 that the Surface Transportation Board arrived at the decision
4 it did in the Consolidated Coal case because in that case,
5 unlike this one, Conrail assigned the contract to another
6 company. Conrail didn't assign this lucrative license
7 agreement to anybody, it kept it. And your Honor has your
8 finger right on the nub of the problem, they want to keep all
9 the income, all their rights, and they want to have somebody
10 -- and it doesn't surprise me they think they may have better
11 luck at the Surface Transportation Board -- they want to have
12 somebody decide that they can be let out of their MFN
13 obligations but keep their \$17 million a year. That's just
14 not the way the system works, if the Court please.

15 With respect to the Fourth, Ninth and Third Circuit
16 cases dealing with the Railway Labor Act, I think we've dealt
17 with those in our papers. They deal with the Railway Labor
18 Act, they deal with situations where the courts have found
19 the transaction can't go forward. Your Honor has asked half
20 a dozen times, if Conrail's fees go down, what impact does

21 that have on the transaction? There isn't any answer to that
 22 because there is no impact on the transaction. Yes, they get
 23 less money -- yes, they get less money -- but they get less
 24 money because they agreed that they wouldn't put us at a
 25 competitive disadvantage. And, having paid them some \$200

□

63

1 million with a future obligation of some \$200 million, we're
 2 entitled to either have that -- to have that promise kept.

3 One final thing. We don't claim liability based on
 4 a contract that's entered into by one of these Conrail
 5 subsidiaries. There's nothing that creates liability as a
 6 result of those contracts. All we claim is that if our
 7 competitors are being paid less, Conrail has to reduce our
 8 fees and, if they refuse, that's a breach. That's what we
 9 want a remedy for in this case, if the Court please.

10 Thank you, your Honor.

11 THE COURT: And Mr. Wellington says, because we
 12 don't control that, therefore, the Board should decide to
 13 what extent, if any, that affects the transaction.

14 MR. HIGGINS: To me, if the Court please, that's a
 15 non sequitur. I mean, they control how much money they take
 16 in --

17 THE COURT: That they control.

18 MR. HIGGINS: -- that they control. They can comply
 19 without harming the transaction, that they control. So,
 20 where is the authority for the STB to step into the mix? You
 21 only have that authority under Dispatchers and all the other
 22 cases --

23 THE COURT: Yeah, the question is whether it can be

24 done without affecting the transaction and --

25 MR. HIGGINS: That's exactly right, your Honor, and

□

64

1 there is no impact on the transaction. As I say, you asked
2 the question a half a dozen times, you haven't gotten an
3 answer because there isn't an answer.

4 THE COURT: I think Mr. Wellington --

5 MR. WELLINGTON: I'll answer. I mean --

6 THE COURT: -- is about to give us the answer.

7 MR. WELLINGTON: -- again, Mr. Higgins keeps asking
8 that question, that was in fact -- that is in fact within the
9 province of the Board. But, fundamentally, the impact is
10 Conrail was a railroad that was required in this transaction
11 to give up 90 percent of its assets basically, it is a tiny
12 operating system since then. The Board, in its decision,
13 decided to leave some income with Conrail vis-a-vis these
14 fiber optic agreements, so that Conrail could continue to
15 operate. Now, to say, well, there's no impact on this
16 carefully balanced transaction if we eliminate \$17 million a
17 year for this -- that supports this railroad is in fact, with
18 all due respect, wrong. And in fact that was part of the
19 delicate balance that the Board decided who got what to keep
20 them all together and to keep Conrail as the insulating
21 entity between these two highly competitive railroads that
22 were trying to become, in the Board's view, an anti-
23 competitive influence in the Northeast.

24 THE COURT: Well, is it your position that the Board
25 would have the jurisdiction to say that if any of the new

□

1 subsidiaries make a deal with a competitor of AT&T for less
2 than what AT&T is paying that AT&T should then pay you less?

3 MR. WELLINGTON: I think that's right, yeah. I had
4 to think of the way that -- but, your Honor, yes, because
5 that's -- yes, that's -- you know, like anyone else who was
6 participating during the proceeding in there, raising
7 questions like AT&T is now raising now, yes, that's what the
8 Board can consider. And what the courts have made clear is
9 you can't circumvent the Board and come to Federal court and
10 try to get damage relief.

11 MR. HIGGINS: Well, if your Honor please, let me
12 refer to the Harris case in the Seventh Circuit. There
13 wasn't any delicate balance that was achieved by the STB in
14 this case, they never mentioned the license agreement because
15 Conrail was keeping it and because it didn't have anything to
16 do with this combination or merger. Judge Easterbrook, in
17 the colloquial, as he's used to, I guess, in this opinion
18 wrote, one problem with this approach, the delicate balance,
19 so-called delicate balance of the Board, is that the
20 commission did not say boo about this labor agreement. Well,
21 this STB didn't say boo about our license agreement. We are
22 in exactly the same kind of situation as the court was in
23 Harris, which is not a case dealing with the Railway Labor
24 Act, and it's a case in which Judge Easterbrook concluded in
25 I think a very sensible paragraph that I commend to this

□

1 Court's attention in connection with this issue, he said and
Page 59

2 I quote, in the unanimous opinion, "Congress gave the agency
3 the power to supersede other laws, use of that power must be
4 respected, but if the commission or board approves a merger
5 without directly or by necessary implication using this
6 power, courts should continue to resolve disputes under
7 generally applicable rules of law." He found none of the
8 relief requested in that case had anything to do with the
9 combination or merger. The relief we ask for in this case
10 reducing fees has nothing to do with the combination or
11 merger.

12 Thank you, your Honor.

13 THE COURT: Thank you.

14 MR. WELLINGTON: With all due respect, the Harris
15 case involved a post-board-approved transaction, and we
16 pointed that out in our brief, and therefore was -- is of no
17 help to the Court here.

18 Thank you.

19 THE COURT: I'm not looking for additional
20 paperwork, but do either one of you have an overwhelming
21 desire to submit anything else in writing?

22 (Laughter.)

23 MR. WELLINGTON: We would be happy to respond in
24 writing to any question your Honor has or that in any way you
25 think --

0

1 THE COURT: No, I'm not --

2 MR. WELLINGTON: -- might be helpful.

3 THE COURT: -- I don't want to provoke it, I just
4 wanted to see if you all wanted it.

7-10-03.txt

5 MR. WELLINGTON: Your Honor, I don't think in my
6 professional career I've ever turned down an offer from a
7 court to submit something else, so I have to be -- I have to
8 tell you that at the beginning --

9 THE COURT: well, why don't you all think about it.

10 MR. WELLINGTON: -- but you've raised a number of
11 questions that it might be useful for us to respond to, your
12 Honor, that's -- so I --

13 THE COURT: How much time do you want to consider
14 it?

15 MR. WELLINGTON: Five days?

16 MR. HIGGINS: Whatever is your Honor's pleasure.

17 THE COURT: All right. why don't you submit
18 anything you want, either side, within ten days, anything
19 that you want to submit, but after that...

20 MR. WELLINGTON: No replies to those, right?

21 THE COURT: Okay.

22 MR. WELLINGTON: Thank you, your Honor.

23 THE COURT: Thank you all, I appreciate your help,
24 it's --

25 MR. HIGGINS: Thank you. And we appreciate your

□

68

1 indulgence, your Honor.

2 THE COURT: Have a good day.

3 COUNSEL: Your Honor, may I just very briefly?

4 THE COURT: Sure.

5 COUNSEL: Just as a status, virtually the discovery
6 with regard to this case has come to a halt because of these
7 motions. we did submit a joint Rule 16 memorandum and...

Page 61

7-10-03.txt

* * *

8

0

EXHIBIT A

Exhibit 3

OPERATING AGREEMENT

dated as of [the Closing Date]

by and between

NEW YORK CENTRAL LINES LLC

as Owner,

and

CSX TRANSPORTATION, INC.

as Operator

TABLE OF CONTENTS

	Page
ARTICLE I	
Definitions and Usage	1
SECTION 1.1 Definitions and Usage	1
ARTICLE II	
Operation of Allocated Assets	1
SECTION 2.1 Operation of Allocated Assets	1
SECTION 2.2 Term of Agreement	1
SECTION 2.3 Reversion Assets	1
ARTICLE III	
Operating Fee and Certain Expenses	2
SECTION 3.1 Operating Fee; Supplemental Operating Fees.	2
SECTION 3.2 Method of Payment	2
SECTION 3.3 Late Payment	2
SECTION 3.4 No Set-off, Counterclaims, etc.	2
SECTION 3.5 Tax Provisions	4
ARTICLE IV	
Representations, Warranties and Agreements	5
SECTION 4.1 Disclaimer of Warranties.	5
SECTION 4.2 Operator To Exercise Certain Rights	6
SECTION 4.3 Representations and Warranties of the Operator	7
SECTION 4.4 Representations and Warranties of the Owner	7
ARTICLE V	
Liens; Quiet Enjoyment	8
SECTION 5.1 Liens.	8
SECTION 5.2 Quiet Enjoyment	8
ARTICLE VI	
Settlement Account	8
SECTION 6.1 Maintenance of Settlement Account	8
SECTION 6.2 Payment of Settlement Account Balance	8
SECTION 6.3 Confirmation of Settlement Account	9

ARTICLE VII

Operation; Maintenance	9
SECTION 7.1 Operation and Maintenance.	9
SECTION 7.2 Modification.	10

ARTICLE VIII

Obsolescence Termination; Abandonment	11
SECTION 8.1 Obsolescence Termination; Abandonment	11
SECTION 8.2 Conditions of Termination	12

ARTICLE IX

Termination	12
SECTION 9.1 Termination.	12
SECTION 9.2 Owner Assignment, Lease or Sale of Allocated Asset.	12
SECTION 9.3 Governmental Approvals	12
SECTION 9.4 Severable Modifications	12

ARTICLE X

Loss, Destruction, Condemnation, Damage, etc.	13
SECTION 10.1 Replacement; Payment.	13
SECTION 10.2 Applications During Event of Default	14
SECTION 10.3 Application of Article VII	14

ARTICLE XI

Indemnities	14
SECTION 11.1 Indemnity by Operator	14
SECTION 11.2 Indemnity by Owner	15
SECTION 11.3 Indemnification Procedures	15

ARTICLE XII

Assignments; Sub-Operating Agreements	16
SECTION 12.1 Operator Assignments.	16
SECTION 12.2 Merger, Consolidation, Etc.	16
SECTION 12.3 Owner Assignments.	16

ARTICLE XIII

Inspection; Markings	17
SECTION 13.1 Rights to Information.	17
SECTION 13.2 Markings	17

ARTICLE XIV

Events of Default	17
SECTION 14.1 Events of Default.	17

ARTICLE XV

Remedies	18
SECTION 15.1 Remedies.	18
SECTION 15.2 Owner Rights.	19
SECTION 15.3 Exercise of Other Rights or Remedies	19
SECTION 15.4 Subject to Governmental Action	19

ARTICLE XVI

Right to Perform	20
SECTION 16.1 Right to Perform	20

ARTICLE XVII

Renewal Options	20
SECTION 17.1 Renewal Notice.	20

ARTICLE XVIII

Certain Notices and Information	21
SECTION 18.1 Notice of Event of Default	21
SECTION 18.2 Information Regarding Allocated Assets	21

ARTICLE XIX

Confidentiality	21
SECTION 19.1 Confidentiality.	21

ARTICLE XX

Miscellaneous	22
SECTION 20.1 Dispute Resolution	22
SECTION 20.2 Documentary Conventions.	22

Schedule

Schedule I: Addresses and Payment Information

Appendix

Appendix A: Definitions

OPERATING AGREEMENT

This **OPERATING AGREEMENT** (this "Agreement") is entered into as of [Closing Date], by and between New York Central Lines LLC, a Delaware limited liability company, as Owner and CSX Transportation, Inc., a Virginia Corporation, as Operator.

ARTICLE I

Definitions and Usage

SECTION 1.1 Definitions and Usage. Unless the context otherwise requires, capitalized terms used herein shall have the respective meanings assigned to them in Appendix A to this Agreement. Terms used, but not defined, in this Agreement or in Appendix A shall have the respective meanings assigned to them in the Transaction Agreement.

ARTICLE II

Operation of Allocated Assets

SECTION 2.1 Operation of Allocated Assets. (a) The Owner hereby agrees with the Operator, and the Operator hereby agrees with the Owner, that the Operator shall have the license, right and obligation to use and operate the Allocated Assets for the term referred to in Section 2.2 hereof on the terms and conditions set forth in this Agreement. Except as otherwise specifically provided in this Agreement, the Operator may use and operate the Allocated Assets in such manner and for such purposes as the Operator considers necessary or appropriate.

(b) The Owner hereby agrees that the Operator shall, effective as of the Closing Date, have the right to receive and retain for its own benefit and use and in its own name all revenues, tolls, rents, receipts, issues, profits and income of every character arising from or associated with the operation and use of the Allocated Assets.

SECTION 2.2 Term of Agreement. Immediately upon the execution hereof, without necessity of any further act or evidence by either party hereto, the Allocated Assets shall be deemed delivered by the Owner to the Operator for the Term and, if the Operator elects to exercise its renewal option pursuant to Article XVII hereof, for any Renewal Term, in either case, all pursuant to the terms of this Agreement, unless this Agreement shall have been earlier terminated in accordance with its terms.

SECTION 2.3 Reversion Assets. Within one (1) year after the Closing Date, the Owner may, with the consent of the Operator, deliver to the Operator a notice electing to terminate the application of this Agreement to certain Allocated Assets (the "Reversion Notice"). The Reversion Notice shall set forth (i) a list of those Allocated Assets selected by the Owner in its sole discretion which will no longer be subject to this Agreement (the "Reversion Assets"), and (ii) the date as of which such Reversion Assets shall no longer be subject to this Agreement,

which date shall be a Payment Date and shall not be less than sixty (60) calendar days after the date of the Reversion Notice (the "Reversion Date"); *provided*, that the fair market value of the Reversion Assets shall not exceed 25% of the aggregate fair market value of all Allocated Assets (including the Reversion Assets) as of the Reversion Date. All Allocated Assets other than the Reversion Assets shall continue after the Reversion Date to be subject to the terms and conditions of this Agreement.

ARTICLE III

Operating Fee and Certain Expenses

SECTION 3.1 Operating Fee; Supplemental Operating Fees. The Operator shall pay to the Owner the Operating Fee commencing on the first Payment Date and on each Payment Date thereafter for the duration of the Term and any Renewal Term. Subject to any applicable Governmental Action, the Operating Fee shall be recalculated on each Valuation Date to reflect the Fair Market Rental Value of the Allocated Assets then subject to this Agreement. Supplemental Operating Fees shall be paid by the Operator when due under the terms of this Agreement.

SECTION 3.2 Method of Payment. All Operating Fees and Supplemental Operating Fees shall be paid by the Operator to the Owner at its office set forth in Schedule I hereto or at such other place in the U.S. as the Owner shall specify in a written notice to the Operator at least five (5) Business Days prior to the date such payment is due. Each payment of Operating Fees and Supplemental Operating Fees shall be made by the Operator in immediately available funds prior to 12:00 noon, New York time at the place of payment, on the date when such payment shall be due.

SECTION 3.3 Late Payment. In the event any Operating Fees or Supplemental Operating Fees shall not be paid on its due date to the Owner, the Operator shall pay to the Owner on written demand, interest (to the extent permitted by Applicable Law) on such overdue amount from the due date thereof (without regard to any grace period) to the date of payment thereof at the Overdue Rate.

SECTION 3.4 No Set-off, Counterclaims, etc. THIS AGREEMENT IS A NET AGREEMENT. THE OPERATOR'S OBLIGATION TO PAY ALL PAYMENTS OF OPERATING FEES AS AND WHEN THE SAME SHALL BECOME DUE AND PAYABLE IN ACCORDANCE WITH THE TERMS OF THIS AGREEMENT SHALL BE ABSOLUTE AND UNCONDITIONAL AND SHALL NOT BE SUBJECT TO ANY ABATEMENT OR DIMINUTION BY SET-OFF, DEDUCTION, COUNTERCLAIM, RECOUPMENT, AGREEMENT, DEFENSE, SUSPENSION, DEFERMENT, INTERRUPTION OR OTHERWISE, AND UNTIL SUCH TIME AS ALL AMOUNTS REQUIRED TO BE PAID UNDER THIS AGREEMENT SHALL HAVE BEEN PAID, THE OPERATOR SHALL NOT

HAVE ANY RIGHT TO TERMINATE THIS AGREEMENT OR TO BE RELEASED, RELIEVED OR DISCHARGED FROM ITS OBLIGATION TO MAKE, AND SHALL NOT SUSPEND, REDUCE OR DISCONTINUE, ANY PAYMENT OF OPERATING FEES FOR ANY REASON WHATSOEVER (EXCEPT AS MAY BE EXPRESSLY PROVIDED HEREIN), including, without limitation:

- (a) any default, misrepresentation, negligence, misconduct or other action or inaction of any kind by the Owner or any other Person, whether under or in connection with this Agreement or any other agreement relating to this Agreement or in connection with any unrelated transaction;
- (b) the insolvency, bankruptcy, reorganization or cessation of existence, or discharge or forgiveness of indebtedness of any Person referred to in clause (a) above;
- (c) the invalidity, unenforceability or impossibility of performance of this Agreement for any reason;
- (d) any defect in the title, condition, design, operation or fitness for use of, or any Lien or other restriction of any kind upon, all or any part of any Allocated Asset, any loss or destruction of, or damage to, any Allocated Asset or any interruption in or cessation of the ownership, possession, operation or use of any Allocated Asset for any reason whatsoever;
- (e) any restriction, prevention or curtailment of or interference with any Allocated Asset or the use thereof or any part thereof for any reason whatsoever, including, without limitation, by any Governmental Authority;
- (f) any Applicable Law now or hereafter in force;
- (g) any failure to obtain any required Governmental Action for a transfer of rights or title to the Owner, the Operator or any other Person;
- (h) any amendment or other change of, or any assignment of any rights under, this Agreement, or any waiver or other action or inaction under or in respect of this Agreement, or any exercise or nonexercise of any right or remedy under or in respect of this Agreement; and
- (i) any other cause, circumstance, happening or event whatsoever, foreseen or unforeseen, whether similar or dissimilar to any of the foregoing.

The Operator hereby waives and hereby agrees to waive at any future time at the request of the Owner, to the extent now or then permitted by Applicable Law, any and all rights that the Operator may have or that at any time hereafter may be conferred upon it, by statute, regulation or otherwise, to terminate, cancel, quit or surrender this Agreement other than in accordance with the express terms hereof. Each Operating Fee payment shall be final and the Operator agrees not

to seek to recover all or any part of any such payment (except for amounts paid to the Owner which the Owner in good faith agrees have been paid in error) from the Owner for any reason under any circumstance whatsoever.

SECTION 3.5 Tax Provisions. (a) During the Term and any Renewal Term, the Operator shall pay when due, all Taxes, other than Excluded Taxes (as hereinafter defined), imposed on the Owner, based upon the Allocated Assets or arising out of the use, lease, possession or operation of the Allocated Assets during that period. For purposes of this Section, (i) Owner shall mean the Owner and its Affiliates and (ii) Excluded Taxes shall mean (A) all Taxes based, in whole or in part, on net income or gross income (including, without limitation, any minimum tax) of the Owner or which are in substitution for, or relieve the Owner from, any Tax based upon or measured by the Owner's net income or gross income, together with any interest, penalties, additions to tax or additional amounts that may become payable in respect thereof; (B) business and occupation taxes, and gross receipts taxes of the Owner and Taxes based upon the equity interests of the Owner; and (C) interest, fines and penalties to the extent due to the acts or omissions of the Owner in connection with Excluded Taxes. The Operator shall not be required to pay any Tax it is obligated to pay under the provisions of this Section 3.5 during the time it shall reasonably and in good faith and by appropriate legal or administrative proceedings contest the validity or amount thereof.

(b) The Owner shall have the right and obligation, at its own expense, to prepare and file all Tax returns required to be filed by the Owner under Applicable Law. Prior to the Owner's filing of any Tax returns for Taxes required to be paid by the Operator under paragraph (a) of this Section 3.5, the Owner shall provide such returns to the Operator for its review and approval, which approval will not be unreasonably withheld or delayed.

(c) The Operator and its assignees and designees shall have the right (but only to the extent the Owner shall have such right, by contract or otherwise) to control at its expense any audit or examination by any Governmental Authority, or any judicial proceeding, relating to any Taxes required to be paid by it under paragraph (a) of this Section 3.5.

(d) During the Term and any Renewal Term, the Operator and any of its designees shall be entitled to claim federal, state and local tax benefits (including, without limitation, deductions and credits) arising out of Operator's expenditures in the use, possession or operation of the Allocated Assets by the Operator, or any of its respective assignees or designees, and the improvements thereto, that the Operator, or any of its designees is entitled to claim under federal, state and local laws and regulations. These tax benefits include but are not limited to: (i) deductions for depreciation or amortization attributable to property (both tangible and intangible) owned by the Operator, or any of its assignees or designees, including improvements made to any of the Allocated Assets by any of them, as well as expenditures made by any of them that are required to be capitalized under sections 263 or 263A or some other section of the Code; (ii) deductions for expenditures made by the Operator, or any of its assignees or designees, deductible as ordinary and necessary business expenses under section 162 of the Code; (iii)

deductions for losses attributable to property (both tangible and intangible) owned by the Operator, or any of its assignees or designees, deductible under section 165 of the Code; and (iv) any federal, state or local credits applicable to the use, lease, possession or operation of the Allocated Assets by the Operator, or any of its assignees or designees, and improvements thereto. The Owner is entitled to deductions for Taxes of the Owner paid by the Operator under paragraph (a) of this Section 3.5 and treated as rent paid by the Operator under this Agreement and taxable income received by the Owner under section 1.162-11(a) of the Income Tax Regulations.

ARTICLE IV

Representations, Warranties and Agreements

SECTION 4.1 Disclaimer of Warranties. AS BETWEEN THE OWNER AND THE OPERATOR, THE EXECUTION OF THIS AGREEMENT SHALL BE CONCLUSIVE PROOF OF ACCEPTANCE BY THE OPERATOR OF EACH ALLOCATED ASSET AS BEING IN COMPLIANCE WITH ALL REQUIREMENTS OF THIS AGREEMENT. THE OWNER AND THE OPERATOR TAKE EACH SUCH ALLOCATED ASSET "AS IS" AND "WHERE IS", AND THE OPERATOR ACKNOWLEDGES THAT THE OWNER HAS NOT MADE, NOR SHALL BE DEEMED TO HAVE MADE, ANY REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, AS TO THE TITLE, VALUE, COMPLIANCE WITH SPECIFICATIONS, CONDITION, MERCHANTABILITY, DESIGN, QUALITY, DURABILITY, OPERATION OR FITNESS FOR USE OR PURPOSE OF EACH SUCH ALLOCATED ASSET OR ANY OTHER REPRESENTATION OR WARRANTY WHATSOEVER, EXPRESS OR IMPLIED, WITH RESPECT TO EACH SUCH ALLOCATED ASSET OR OTHERWISE, IT BEING AGREED THAT ALL RISKS INCIDENT THERETO ARE TO BE BORNE, AS BETWEEN THE OWNER AND THE OPERATOR, BY THE OPERATOR IN THE EVENT OF ANY DEFECT OR DEFICIENCY IN ANY SUCH ALLOCATED ASSET, OF ANY NATURE WHETHER PATENT OR LATENT, AND THAT THE OWNER SHALL NOT HAVE ANY RESPONSIBILITY OR LIABILITY WITH RESPECT THERETO, except that the Owner hereby represents, warrants and covenants that each such Allocated Asset shall be free of Owner Liens on the Closing Date and except as otherwise provided in the Transaction Agreement. The provisions of this Section 4.1 have been negotiated, and the foregoing provisions are intended to be a complete exclusion and negation of any other warranties made by the Owner, express or implied, with respect to any Allocated Asset, whether arising pursuant to Applicable Law now or hereafter in effect or otherwise. Nothing contained in this Section 4.1 shall in any way diminish or otherwise affect any right the Operator may have with respect to any Allocated Asset against any third Person. The Owner shall not at any time be required to inspect any Allocated Asset, and any actual inspection by the Owner shall not be deemed to affect or modify the provisions of this Section 4.1.

SECTION 4.2 Operator To Exercise Certain Rights. (a) The Owner hereby authorizes the Operator, at the Operator's expense, to exercise in the name of and on behalf of the Owner and the Operator, as their interests may appear, the right and power to deal with any third party lessor, lessee, licensor, licensee, seller, manufacturer, shipper or any other Persons (including agents and consultants thereof) with respect to any Allocated Asset or who are party to any Assigned Rights (each a "Third Party Provider") and the right to enforce (by legal action or otherwise) against such Third Party Provider all rights, powers and privileges of the Owner and to receive all benefits of the Owner with respect to such Third Party Provider, under any Contract, express or implied warranty, indemnity or otherwise; *provided*, that if an Event of Default shall have occurred and be continuing (and until all Events of Default, then outstanding shall no longer be continuing) the Owner may terminate the authority of the Operator under this Section 4.2. Any amount paid to the Owner or Operator pursuant to the Operator's exercise of its authority under this Section 4.2 shall be paid to the Operator. After the end of the Term or any Renewal Term with respect to any Allocated Asset or after the termination of this Agreement with respect to such Allocated Asset pursuant to Article XIV, (a) the Operator shall have no further rights, powers, privileges or benefits under this Section 4.2 and (b) all amounts payable by any Third Party Provider paid with respect to periods arising thereafter shall be paid to, and retained by, the Owner or any other Person as shall then be the owner of the Allocated Asset as to which such payment is made.

(b) The Operator shall, with the Owner's prior consent, have the right and power to execute and deliver on behalf of the Owner, the extension, renewal, amendment or modification of any Assigned Rights or any other Contract in respect of the Allocated Assets.

(c) The Owner shall as expeditiously as possible use its reasonable efforts to obtain or transfer to the Operator any Governmental Action or the consent, authorization, or approval of any private Person required to be made, obtained or transferred to effectuate the purposes of this Agreement and the transactions contemplated herein, which actions shall include furnishing all information required under or in connection with such Governmental Action or the approvals of, or filing with such private Person.

(d) The Operator shall pay, perform and discharge fully all of the obligations of the Owner or its Affiliates under all Assigned Rights and Contracts that are Allocated Assets from and after the Closing Date. The Owner or its Affiliates shall, without further consideration therefor, pay, assign and remit promptly to the Operator, as appropriate, all monies, rights and other consideration received in respect of such performance. The Owner or its Affiliates shall exercise or exploit the rights and options under all such Contracts only as reasonably directed by the Operator.

SECTION 4.3 Representations and Warranties of the Operator. The Operator represents and warrants to the Owner as of the Closing Date as follows:

(a) Due Organization, etc. The Operator (i) is a corporation duly organized and validly existing under the laws of the Commonwealth of Virginia, (ii) has the power and authority to enter into and perform its obligations under this Agreement and (iii) has obtained all Governmental Action required to use or hold the Allocated Assets in accordance with this Agreement, and to enter into and perform its obligations under this Agreement.

(b) Due Authorization, Non-Contravention, etc. The execution, delivery and performance of this Agreement have been duly authorized by all necessary corporate action on the part of the Operator, do not and will not conflict with, result in any violation of, or constitute any default under, any provision of any Organic Document of the Operator or Applicable Law.

(c) Due Execution. This Agreement has been duly executed and delivered by the Operator, and constitutes the legal, valid and binding obligation of the Operator enforceable against the Operator in accordance with its terms, except as enforcement may be limited by bankruptcy, insolvency, reorganization or other laws of general application relating to or affecting the enforcement of creditors' rights and except that the availability of equitable remedies, including specific performance, is subject to the discretion of the court before which any proceeding therefor may be brought.

SECTION 4.4 Representations and Warranties of the Owner. The Owner represents and warrants to the Operator as of the Closing Date as follows:

(a) Due Organization, etc. The Owner (i) is a limited liability company duly organized and validly existing under the laws of the State of Delaware, (ii) has the power and authority to enter into and perform its obligations under this Agreement and (iii) has obtained all Governmental Action required to enter into and perform its obligations under this Agreement.

(b) Due Authorization, Non-Contravention, etc. The execution, delivery and performance of this Agreement have been duly authorized by all necessary company action on the part of the Owner, do not and will not conflict with, result in any violation of, or constitute any default under, any provision of any Organic Document of the Owner or Applicable Law.

(c) Due Execution. This Agreement has been duly executed and delivered by the Owner, and constitutes the legal, valid and binding obligation of the Owner enforceable against the Owner in accordance with its terms, except as enforcement may be limited by bankruptcy, insolvency, reorganization or other laws of general application relating to or affecting the enforcement of creditors' rights and except that the availability of equitable remedies, including specific performance, is subject to the discretion of the court before which any proceeding therefor may be brought.

ARTICLE V

Liens: Quiet Enjoyment

SECTION 5.1 Liens. The Operator shall not directly or indirectly create, incur, assume or suffer to exist any Lien (other than Permitted Liens) on any Allocated Asset. The Operator will promptly, at its own expense, take such action as may be necessary duly to discharge any such Lien. The Operator's obligations under this Section 5.1 with respect to any such Lien on any Allocated Asset resulting from a claim arising prior to the termination of this Agreement with respect to such Allocated Asset shall survive such termination. The Operator agrees that, upon the termination of this Agreement, the Allocated Assets shall be returned to the Owner free and clear of Liens, other than Owner Liens.

SECTION 5.2 Quiet Enjoyment. Notwithstanding any other provision of this Agreement, so long as no Event of Default shall have occurred and be continuing, as between the Operator and Owner, the Operator shall have the exclusive rights to possession, control and use of all Allocated Assets and neither the Owner nor any Person acting or claiming through the Owner will take any action that shall interfere with the peaceful and quiet enjoyment or the possession and use or nonuse of any Allocated Asset by the Operator, and the Operator shall have the right to possess and use or not use such Allocated Asset in its sole discretion, subject always to the terms and conditions of this Agreement. The foregoing is not intended to limit the inspection rights of the Allocated Assets granted by the Operator pursuant to Section 12.1 hereof.

ARTICLE VI

Settlement Account

SECTION 6.1 Maintenance of Settlement Account. The Operator shall maintain a non-cash book account (the "Settlement Account") to reflect amounts owed by the Operator to the Owner as a result of transactions described in Sections 7.1(e), 8.1 and 10.1(a)(ii) hereof.

SECTION 6.2 Payment of Settlement Account Balance. The Operator shall pay to the Owner an amount equal to the then balance of the Settlement Account upon: (i) the sixth (6th), twelfth (12th), eighteenth (18th) and twenty-fourth (24th) anniversaries of the Closing Date, (ii) the expiration of the Term (or, if earlier, the termination of this Agreement), (iii) the sixth (6th) anniversary of the first day of each Renewal Term, (iv) the end of each Renewal Term (or, if earlier, the termination of this Agreement), (v) the Reversion Date (but only with respect to the Reversion Assets), and (vi) thirty (30) calendar days after the date on which a Substantial Allocated Asset (a) is not repaired or replaced under Section 7.1(e) hereof, (b) is abandoned, sold or otherwise disposed of under Section 8.1 hereof or (c) suffers an Event of Loss and is not replaced under Section 10.1(a)(i) hereof (each, a "Settlement Account Payment Date").

SECTION 6.3 Confirmation of Settlement Account. Within ten (10) days prior to a Settlement Account Payment Date, the Appraisal Procedure shall be used to confirm that credits to the Settlement Account were based on the fair market value of the relevant Allocated Assets consistent with the terms of this Agreement. The Settlement Account shall be adjusted consistent with the outcome of the Appraisal Procedure and the payments made pursuant to Section 6.2 hereof shall reflect any such adjustments.

ARTICLE VII

Operation: Maintenance

SECTION 7.1 Operation and Maintenance. The Operator shall at all times at its own expense during the Term:

- (a) use the Allocated Assets in such manner and for such purposes as the Operator considers necessary or appropriate in connection with the operation of its business;
- (b) keep and maintain such books, records and title documents relating to the Allocated Assets, and the acquisition, construction and installation of Modifications thereto and the payment of the purchase price of such Modifications, as the Operator considers appropriate consistent with the Operator's customary business practices;
- (c) maintain the Allocated Assets in accordance with the Operator's customary practice;
- (d) inspect, service, maintain, store, use, operate, repair, replace, modify and improve the Allocated Assets in compliance in all material respects with Applicable Law (including all applicable environmental and occupational safety laws), and in compliance in all material respects with all applicable licenses and permits relating to the Allocated Assets issued by any Governmental Authority; *provided*, the Operator may in good faith by appropriate proceedings contest the validity or application of any such Applicable Law in any reasonable manner which does not involve any risk of the imposition of criminal liability on the Owner, or any material danger of any fine, penalty, or other imposition upon the Owner for which the Operator has not acknowledged its obligation to indemnify the Owner pursuant to this Agreement; and
- (e) in case of any damage to any Allocated Asset, other than damage constituting an Event of Loss, at its election, in either case at its own expense, (i) repair such Allocated Asset so as to restore its utility consistent with the Operator's customary practice with respect to similar assets owned by the Operator (as determined solely by the Operator) or (ii) replace such Allocated Asset with an asset (which will become an Allocated Asset) having a fair market value (as determined solely by the Operator) equivalent to that of the damaged Allocated

Asset immediately prior to the damage (assuming, in either case, such Allocated Asset was then in the condition and state of repair required to be maintained by the terms of this Agreement), with such alterations and additions as may be made at the Operator's election pursuant to and subject to the conditions of Section 7.2 hereof; *provided, however*, that the Operator need not repair or replace any Allocated Asset to the extent that such Allocated Asset is not necessary to the operation of the Allocated Assets considered as a whole (as determined solely by the Operator), in which event the Operator shall credit to the Settlement Account the fair market value of such Allocated Asset as of the date immediately prior to the damage (assuming such Allocated Asset was then in the condition and state of repair required to be maintained by the terms of this Agreement). Upon the crediting of the Settlement Account with the fair market value of such Allocated Asset, such Allocated Asset shall no longer be subject to this Agreement and the Owner shall convey to the Operator or its designee, ownership of and title to such Allocated Asset. Notwithstanding the foregoing, until payment by the Operator to the Owner of the amount credited to the Settlement Account on the next succeeding Settlement Account Payment Date, such Allocated Asset shall be deemed to continue to be subject to this Agreement solely for the purpose of calculating the Operating Fee.

SECTION 7.2 Modification.

(a) The Operator shall at its expense make any Modification to any Allocated Asset required (i) by Applicable Law or in order to operate, maintain, service, store, or use such Allocated Asset in accordance with Applicable Law, as soon as practicable after any such requirement may arise or (ii) in order for the Operator to comply with the provisions of this Agreement (all such Modifications being referred to herein as "Required Modifications"); *provided*, that the Operator may, so long as no Event of Default shall have occurred and be continuing, in good faith by appropriate proceedings contest the validity or application of any Applicable Law in any reasonable manner which does not involve any reasonably foreseeable risk of the imposition of criminal liability on the Owner, or any material danger of any fine, penalty or other imposition upon the Owner for which the Operator has not acknowledged its obligation to indemnify the Owner pursuant to this Agreement. The Operator at its expense, from time to time, may make any Modification to any Allocated Asset that the Operator in its discretion may deem desirable in the proper conduct of the Operator's business (all such Modifications which are not Required Modifications being referred to herein as "Optional Modifications"); *provided* that any construction of new trackage or facilities appurtenant to but not located on such Allocated Assets shall, at Operator's election, be deemed not to be Modifications hereunder and not subject to this Agreement.

(b) Title to each Modification shall vest as follows:

(i) in the case of each (A) Required Modification or (B) other Nonseverable Modification, whether or not the Owner shall have financed or provided financing (in whole or in part) for such Modification, the Owner shall, without further act, effective on the

date such Modification shall have been incorporated into the modified Allocated Asset, acquire title to such Modification free and clear of all Liens other than Permitted Liens; or

(ii) in the case of each Severable Modification, the Operator shall retain title to such Modification and the Operator may (subject to Section 7.2(c) hereof) remove such Modification at its expense at any time so long as the modified Allocated Asset remains in or is restored by the Operator to the condition required by this Agreement.

Immediately upon title to a Modification vesting in the Owner pursuant to this Section 7.2(b), such Modification shall, without further act, become subject to this Agreement and be deemed part of the applicable Allocated Asset for all purposes.

(c) Subject to compliance with Applicable Law, the Operator may remove, at its expense, any Severable Modification; *provided*, that the Operator, at its expense shall repair any damage to the Allocated Asset from which a Severable Modification has been removed caused by such removal; *provided, further*, that in the event the Operator shall not have removed any Severable Modification to which the Operator shall have title as provided in Section 6.2(b)(ii) prior to the end of the Term, title to such Severable Modification shall vest in the Owner upon the expiration of such Term.

ARTICLE VIII

Obsolescence Termination: Abandonment

SECTION 8.1 Obsolescence Termination: Abandonment. Except as may otherwise be contemplated in this Agreement, the Operator may not dispose of, or otherwise convey or transfer any interest in the Allocated Assets to any Person. Unless an Event of Default shall have occurred and be continuing, if the Operator has determined that an Allocated Asset is uneconomic or surplus to, or no longer necessary for, the Operator's operating requirements as determined by the Operator in its sole judgment, the Operator shall have the right, with the Owner's consent, to terminate the application of this Agreement with respect to such Allocated Asset and, with the Owner's consent, to abandon or sell or otherwise dispose of such Allocated Asset (as agent for the Owner) in which event the Operator may retain the sale proceeds, if any, received for such Allocated Asset and shall credit to the Settlement Account the fair market value (as of the time of the abandonment, sale or other disposition) of such Allocated Asset (which, in no event, shall be less than the sale proceeds received for such Allocated Asset). Upon the crediting of the Settlement Account with the fair market value of such Allocated Asset, such Allocated Asset shall no longer be subject to this Agreement and the Owner shall convey to the Operator or its designee, ownership of and title to such Allocated Asset. Notwithstanding the foregoing, until payment by the Operator to the Owner of the amount credited to the Settlement Account on the next succeeding Settlement Account Payment Date, such Allocated Asset shall be deemed to continue to be subject to this Agreement solely for the purpose of calculating the Operating Fee.

SECTION 8.2 Conditions of Termination. As a condition to a termination, abandonment or other disposition pursuant to this Article VIII, any necessary Governmental Actions in connection therewith shall have been obtained by and at the expense of the Operator. Upon the Operator's request, the Owner shall cooperate fully with the Operator in seeking and obtaining all necessary Governmental Actions in connection with the termination or abandonment of any Allocated Asset.

ARTICLE IX

Termination

SECTION 9.1 Termination. (a) Unless the Operator exercises its renewal option under Article XVII, upon termination of this Agreement or return of any Reversion Asset pursuant to Section 2.3 hereof, the Operator shall, at its risk, cost and expense, cause the Allocated Assets subject to this Agreement at such time or the Reversion Assets to be (i) free and clear of all Liens other than Owner Liens, (ii) in compliance with the maintenance and operating provisions of this Agreement, and (iii) otherwise capable of being maintained, used and operated substantially in compliance with Applicable Law for the operation of a railroad appropriate to conditions existing at such time.

(b) Upon the termination of this Agreement or return of any Reversion Asset pursuant to Section 2.3 hereof, the Operator will, at the Operator's expense, promptly and duly execute and deliver to the Owner such documents and take such further actions as the Owner may reasonably request in order to effect the return of such Allocated Assets or Reversion Assets, including any Assigned Right, to the Owner or its designee.

SECTION 9.2 Owner Assignment, Lease or Sale of Allocated Asset. The Operator agrees that during the last year of the Term or any Renewal Term, it will cooperate in all reasonable respects with efforts of the Owner to lease, sell assign or otherwise transfer any Allocated Asset to any designee of the Owner.

SECTION 9.3 Governmental Approvals. The Operator shall cooperate and assist the Owner, at the expense of the Owner, in transferring or obtaining all Governmental Actions which may be necessary for the Owner or its designee, as the case may be, to operate, lease, purchase, assume or otherwise be a party to or beneficiary of any returned Allocated Asset and any Reversion Asset.

SECTION 9.4 Severable Modifications. At any time after the Operator has notified the Owner that it has determined not to renew this Agreement pursuant to Article XVII, or operational responsibility for the Allocated Assets or Reversion Assets reverts to the Owner, the Operator shall at the Owner's request, advise the Owner of the nature and condition of all Severable Modifications owned by the Operator pursuant to Section 7.2(b)(ii) hereof which the

Operator has removed or intends to remove from the Allocated Assets or Reversion Assets in accordance with Section 7.2(c) hereof. The Operator may (and shall, if so directed by Owner), at its sole cost, expense and risk, remove from any Allocated Asset or Reversion Asset any Severable Modification; *provided*, that any such Modification not removed pursuant to this Section 9.4 shall be deemed to be part of the Allocated Asset or Reversion Asset to which it relates for all purposes hereof and title to such Modification shall thereupon vest in the Owner free and clear of all Liens, other than Owner Liens.

ARTICLE X

Loss, Destruction, Condemnation, Damage, etc.

SECTION 10.1 Replacement; Payment.

(a) Upon the occurrence of an Event of Loss, or an event which with the passage of time would become an Event of Loss, with respect to any Allocated Asset, the Operator shall:

(i) replace the Allocated Asset which suffered the Event of Loss, with a replacement asset (which will become an Allocated Asset) which has a fair market value equivalent to that of the Allocated Asset which suffered the Event of Loss (as determined solely by the Operator) immediately prior to such Event of Loss (assuming such Allocated Asset was then in the condition and state of repair required by this Agreement); or

(ii) the Operator may retain the sale proceeds, if any, received for the Allocated Asset suffering the Event of Loss and shall credit to the Settlement Account the fair market value of such Allocated Asset immediately prior to such Event of Loss (assuming such Allocated Asset was then in the condition and state of repair required by this Agreement), which fair market value in no event shall be less than the sale proceeds received for such Allocated Asset. Upon the crediting of the Settlement Account with the fair market value of such Allocated Asset, such Allocated Asset shall no longer be subject to this Agreement and the Owner shall convey to the Operator or its designee, ownership of and title to such Allocated Asset. Notwithstanding the foregoing, until payment by the Operator to the Owner of the amount credited to the Settlement Account on the next succeeding Settlement Account Payment Date, the Allocated Asset suffering the Event of Loss shall be deemed to continue to be subject to this Agreement solely for the purpose of calculating the Operating Fee.

(b) Upon compliance by the Operator with Section 10.1(a)(i), (i) this Agreement shall continue with respect to any replacement Allocated Asset as though no Event of Loss had occurred, (ii) the Owner shall convey "as is" "where is", free and clear of all Owner Liens, without recourse or warranty (except as to the ability and authority of the Owner to transfer and convey such Allocated Asset free and clear of Owner Liens), to the Operator or its

designee all right, title and interest of the Owner in and to the Allocated Asset being replaced by executing and delivering to the Operator or its designee such bills of sales and other documents or instruments as the Operator or its designee may reasonably request to evidence such conveyance, and (iii) the Owner shall assign to the Operator all claims it may have against any other Person arising from the event which gave rise to the replacement.

(c) Upon compliance by the parties with Section 10.1(a)(ii), the Owner shall convey "as is" "where is", free and clear of all Owner Liens, without recourse or warranty (except as to the ability and authority of the Owner to transfer and convey such Allocated Asset free and clear of Owner Liens) to the Operator or its designee all right, title and interest of the Owner in and to such Allocated Asset by executing and delivering to the Operator or its designee such bills of sales and other documents or instruments as the Operator or its designee may reasonably request to evidence such conveyance.

SECTION 10.2 Applications During Event of Default. Any amount that shall be payable to the Operator pursuant to this Agreement arising out of any warranty, governmental award or otherwise received in respect of any Allocated Asset shall not be paid to the Operator or, if it shall have been previously paid to the Operator, shall not be retained by the Operator but shall be paid to the Owner, if at the time of such payment any Event of Default shall have occurred and be continuing. In such event, all such amounts shall be paid to and held by the Owner in trust as security for the obligations of the Operator to make payments under this Agreement or applied by the Owner toward payment of any of such obligations of the Operator at the time due hereunder. At such time as there shall not be continuing any Event of Default all such amounts at the time held by the Owner in excess of the amount, if any, that the Owner shall have elected to apply as above provided shall be paid to the Operator.

SECTION 10.3 Application of Article VII. Article VII shall not apply to any Allocated Asset after an Event of Loss has occurred with respect to such Allocated Asset; *provided*, that the foregoing shall not limit the obligations of the Operator under Article VII hereof with respect to any replacement Allocated Asset.

ARTICLE XI

Indemnities

SECTION 11.1 Indemnity by Operator. (a) The Operator assumes and shall be fully responsible for all liabilities attributable in any way to the Allocated Assets, or to operations on or over the Allocated Assets, except for (i) Retained Liabilities and any other liabilities with respect to which it is the responsibility of any Person other than the Operator under the terms of the Transaction Agreement and the Ancillary Agreements to indemnify the Owner, and (ii) liabilities that arise prior to the Closing Date referred to in Section 2.8(b)(i) or Section 2.8(c) of the Transaction Agreement; *provided*, that for the purposes of this Section 11.1(a), the term

"Ancillary Agreements" as used in the parenthetical included in Sections 2.8(b) and 2.8(c) of the Transaction Agreement shall be deemed not to include this Agreement. To that end, the Operator agrees to and shall protect, indemnify and hold wholly harmless the Owner and its directors, officers, employees and agents (each an "Owner Indemnified Person") from and against any Damages arising from or attributable to the liabilities assumed by the Operator under the first sentence of this Section 11.1(a).

(b) Upon payment in full of any indemnity pursuant to this Section 11.1, the Operator shall, to the extent of such payment and so long as no Event of Default shall have occurred and be continuing, be subrogated to any rights of the Owner Indemnified Person in respect of the matter against which such indemnity was given (other than with respect to any insurance policies carried by such Owner Indemnified Person).

SECTION 11.2 Indemnity by Owner. (a) The Owner shall be fully responsible for all liabilities which arise prior to the Closing Date which are referred to in Section 2.8(b)(i) or Section 2.8(c) of the Transaction Agreement. To that end, the Owner agrees to and shall protect, indemnify and hold wholly harmless the Operator and its directors, officers, employees and agents (each, an "Operator Indemnified Person") from and against any and all Damages arising from or attributable to (i) Retained Liabilities and any other liabilities with respect to which it is the responsibility of any Person other than the Operator under the terms of the Transaction Agreement and the Ancillary Agreements to indemnify the Owner, and (ii) liabilities that arise prior to the Closing Date referred to in Section 2.8(b)(i) and Section 2.8(c) of the Transaction Agreement; *provided*, that for the purposes of this Section 11.2(a), the term "Ancillary Agreements" as used in the parenthetical included in Sections 2.8(b) and 2.8(c) of the Transaction Agreement shall be deemed not to include this Agreement.

(b) Upon payment in full of any indemnity pursuant to this Section 11.2, the Owner shall, to the extent of such payment, be subrogated to any rights of the Operator Indemnified Person in respect of the matter against which such indemnity was given (other than with respect to any insurance policies carried by such Operator Indemnified Person).

SECTION 11.3 Indemnification Procedures. (a) If any Action shall be threatened or instituted or any claim or demand shall be asserted against any Indemnified Party in respect of which indemnification may be sought under the provisions of this Agreement, the Indemnified Party shall promptly cause written notice of the assertion of any such claim, demand or Action of which it has knowledge to be forwarded to the Indemnifying Party. Such notice shall contain a reference to the provisions hereof or of such other agreement, instrument or certificate delivered pursuant hereto, in respect of which such claim is being made. The Indemnified Party's failure to give the Indemnifying Party prompt notice shall not preclude the Indemnified Party from obtaining indemnification from the Indemnifying Party under this Article XI unless the Indemnified Party's failure has materially prejudiced the Indemnifying Party's ability to defend the claim, demand or Action.

(b) If the Indemnified Party seeks indemnification from the Indemnifying Party as a result of a claim or demand being made by a third party (a "Third Party Claim"), the Indemnifying Party shall have the right promptly to assume the control of the defense of any Action with respect to such Third Party Claim, including, at its own expense, employment by it of counsel reasonably satisfactory to the Indemnified Party. The Indemnified Party may, in its sole discretion and at its own expense, employ counsel to represent it in the defense of the Third Party Claim, and in such event counsel for the Indemnifying Party shall cooperate with counsel for the Indemnified Party in such defense, provided that the Indemnifying Party shall direct and control the defense of such Third Party Claim or proceeding. The Indemnifying Party shall not consent to the entry of any judgment, except with the written consent of the Indemnified Party, and shall not enter into any settlement of such Third Party Claim without the written consent of the Indemnified Party which does not include as an unconditional term thereof the release of the Indemnified Party from all Liability in respect of such Third Party Claim.

ARTICLE XII

Assignments: Sub-Operating Agreements

SECTION 12.1 Operator Assignments. Except as otherwise provided in this Agreement, the Operator may not, without the prior written consent of the Owner, and subject to any applicable Governmental Actions, assign, transfer, sublease or otherwise grant the right to use any Allocated Asset or its interest therein or rights with respect thereto, including any Assigned Right.

SECTION 12.2 Merger, Consolidation, Etc. The Operator, without the consent of the Owner, may assign all or any part of its rights and obligations under this Agreement to (i) any of its controlled Subsidiaries or (ii) any successor in the event of a merger, consolidation, sale of all or substantially all its assets, liquidation or dissolution, if such assignee executes and delivers to the Owner an agreement reasonably satisfactory in form and substance to the Owner under which such assignee assumes and agrees to perform and discharge all the obligations and liabilities of the Operator; *provided* that any such assignment shall not relieve the Operator from the performance and discharge of such obligations and liabilities.

SECTION 12.3 Owner Assignments. The Owner shall not transfer or assign any part of its right, title and interest in this Agreement or any Allocated Assets used hereunder without the prior written consent of the Operator.

ARTICLE XIII

Inspection; Markings

SECTION 13.1 Rights to Information. The Owner may at its own expense, upon reasonable prior notice to the Operator during the normal business hours of the Operator, no more frequently than once in any calendar year, inspect the Allocated Assets and the books and records of the Operator relating to the maintenance and performance of such Allocated Assets and make copies and extracts therefrom, and may discuss such matters with the Operator's officers. Upon the occurrence and during the continuance of an Event of Default, the Owner may inspect such books and records at any time, which inspections shall be at the expense of the Operator. The Owner also shall have the right to obtain information regarding the condition and state of repair of any Allocated Asset, compliance by the Operator with Article VII hereof and the absence of an Event of Default.

SECTION 13.2 Markings. The Operator shall affix to certain Allocated Assets agreed to by the Operator and Owner identifying labels, plates or tags each setting forth such information as the Operator and Owner may agree. The Operator covenants and agrees to replace any such label, plate or tag which may be removed or destroyed or become illegible, and the Operator shall indemnify each Owner Indemnified Person against any liability, loss or expense incurred by such Owner Indemnified Person as a result of the failure to maintain such markings.

ARTICLE XIV

Events of Default

SECTION 14.1 Events of Default. Each of the following events shall constitute an Event of Default (whether any such event shall be voluntary or involuntary or come about or be effected by operation of law or pursuant to or in compliance with any judgment, decree or order of any court or any order, rule or regulation of any Governmental Authority):

(a) the Operator shall fail to make any payment of (i) the Operating Fee when due and such failure shall continue unremedied for a period of thirty (30) Business Days and (ii) any Supplemental Operating Fees due under this Agreement and such failure shall continue unremedied for a period of thirty (30) Business Days; or

(b) the Operator shall fail to perform or observe any other material covenant, condition or agreement to be performed or observed by it under this Agreement and such failure shall continue unremedied for a period of one hundred twenty (120) Business Days after notice thereof shall have been given to the Operator by the Owner; *provided*, that the continuation of any such failure or breach (other than a failure or breach curable by payment of money) for a period longer than such one hundred twenty (120) Business Day period shall not constitute an

Event of Default if (i) such default is curable but cannot be cured within such one hundred twenty (120) Business Day period and (ii) the Operator is diligently pursuing the cure of such default; *provided, further*, that any such failure or breach (other than a failure or breach curable by payment of money) shall constitute an Event of Default if such failure is not cured within the earlier of the last Business Day of the Term and four hundred fifty (450) days from the date notice thereof has been given to the Operator; or

(c) The Operator (i) shall commence a voluntary Insolvency Proceeding, (ii) shall seek the appointment of a trustee, receiver, liquidator, sequestrator, custodian or other similar official of the Operator or any substantial part of the Operator's property, (iii) shall acquiesce in or consent to any such relief or to the appointment of or taking possession by any such official in an involuntary Insolvency Proceeding commenced against it, (iv) shall make a general assignment for the benefit of creditors, or (v) shall fail generally to pay its undisputed debts as they become due; or

(d) an involuntary Insolvency Proceeding shall be commenced against the Operator seeking liquidation, reorganization or other relief with respect to such Person or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect or seeking the appointment of a trustee, receiver, liquidator, assignee, sequestrator, custodian or other similar official of it or any substantial part of its property, and such involuntary case or other proceeding shall remain undismissed or unstayed for a period of one hundred twenty (120) consecutive Business Days.

ARTICLE XV

Remedies

SECTION 15.1 Remedies. Upon the occurrence of any Event of Default and at any time thereafter so long as the same shall be continuing, the Owner may, at its option, declare by written notice to the Operator this Agreement to be in default; and at any time thereafter so long as such Event of Default shall not have been remedied, the Owner may do one or more of the following with respect to the Allocated Assets:

(a) sell the Allocated Assets at public or private sale, as the Owner may determine, or otherwise dispose of, hold, use, operate, lease to others or keep unused the Allocated Assets as the Owner, in its sole discretion, may determine, all free and clear of any rights of Operator;

(b) whether or not the Owner shall have exercised, or shall thereafter at any time exercise, any of its rights under paragraph (a) above, the Owner, by written notice to the Operator, may demand that the Operator pay to the Owner, and the Operator shall pay to the Owner, any accrued but unpaid Operating Fees (together with interest, if any, on such amount at

the Overdue Rate from such specified payment date until the date of actual payment of such amount);

(c) The Owner may terminate this Agreement and the rights of the Operator to use the Allocated Assets pursuant hereto.

The Owner may exercise one or more remedies in respect of certain Allocated Assets and one or more other remedies in respect of other Allocated Assets.

No termination of this Agreement, in whole or in part, or exercise of any remedy under this Article XV shall, except as specifically provided herein, relieve the Operator of any of its liabilities and obligations hereunder, all of which then outstanding shall survive such termination, repossession or exercise of remedy. In addition, the Operator shall be liable for any and all Fees and Expenses and other costs and expenses incurred by the Owner by reason of the occurrence of any Event of Default or the exercise of the remedies of the Owner with respect thereto. At any sale of any Allocated Assets or any part thereof pursuant to this Article XV, the Owner may bid for and purchase such property.

SECTION 15.2 Owner Rights. To the fullest extent permitted by Applicable Law, each and every right, power and remedy herein specifically given to the Owner or otherwise in this Agreement shall be cumulative and shall be in addition to every other right, power and remedy herein specifically given or now or hereafter existing at law, in equity or by statute, and each and every right, power and remedy whether specifically given herein or otherwise existing may be exercised from time to time and as often and in such order as may be deemed expedient by the Owner, and the exercise or the beginning of the exercise of any power or remedy shall not be construed to be a waiver of the right to exercise at the same time or thereafter any other right, power or remedy. No delay or omission by the Owner in the exercise of any right, power or remedy or in the pursuit of any remedy shall impair any such right, power or remedy or be construed to be a waiver of any default on the part of the Operator or to be an acquiescence therein. No express or implied waiver by the Owner of any Event of Default shall in any way be, or be construed to be, a waiver of any future or subsequent Event of Default.

SECTION 15.3 Exercise of Other Rights or Remedies. In addition to all rights and remedies provided in this Article XV, the Owner may exercise any other right or remedy that may be available to it under Applicable Law or proceed by appropriate court action to enforce the terms hereof or to recover damages for the breach hereof.

SECTION 15.4 Subject to Governmental Action. The exercise of any right or remedy provided for in this Article XV shall be subject to any applicable Governmental Action.

ARTICLE XVI

Right to Perform

SECTION 16.1 Right to Perform. If the Owner shall fail to make any payment or perform under, or comply with, any contract, lease, license or other agreement in respect of the Allocated Assets to which the Owner is a party, the Operator may (but shall have no duty to do so) make such payment or perform or comply with such agreement, and the Operating Fee shall be reduced in the amount of such payment and the amount of all expenses of the Operator (including Fees and Expenses) incurred in connection with such payment or the performance of or compliance with such agreement.

ARTICLE XVII

Renewal Options

SECTION 17.1 Renewal Notice.

(a) The Operator shall have the option to renew this Agreement twice. Not less than one (1) year before expiration of the Term or the initial Renewal Term, the Operator may deliver to the Owner a notice (the "Renewal Notice") of the Operator's election to renew this Agreement in respect of all, but not less than all, Allocated Assets for a renewal period of ten (10) years (or, if there has already been a renewal period, an additional renewal period of ten (10) years), or such other period of time as the Owner and the Operator shall mutually agree (each such period, a "Renewal Term").

(b) All terms of this Agreement shall continue in full force and effect during each such Renewal Term.

(c) In the event the Operator elects to renew this Agreement, the Renewal Term will commence on the day immediately following the expiration of the Term or initial Renewal Term and continue until the end of such Renewal Term.

(d) The Renewal Notice, once given, shall be irrevocable and the option to renew this Agreement shall expire if the Operator does not deliver the Renewal Notice by the times provided in Section 17.1(a) hereof.

(e) Notwithstanding the foregoing, the Operator shall have no right to renew this Agreement if any Event of Default exists on the date of delivery of the Renewal Notice or the commencement of the Renewal Term.

ARTICLE XVIII

Certain Notices and Information

SECTION 18.1 Notice of Event of Default. Promptly after an executive officer of the Operator shall have actual knowledge of the occurrence or existence of any Event of Default or any event which, with the passing of time or giving of notice, would constitute an Event of Default, the Operator shall so notify the Owner and set forth in reasonable detail the circumstances surrounding such event or Event of Default and shall specify what actions the Operator has taken or intends to take to cure such event or Event of Default.

SECTION 18.2 Information Regarding Allocated Assets. The Operator shall promptly furnish the information at such times and in such format as is regularly produced by the Operator concerning the condition, maintenance and use of the Allocated Assets as the Owner may reasonably request.

ARTICLE XIX

Confidentiality

SECTION 19.1 Confidentiality. The parties hereto shall hold, and shall cause their respective officers, employees, agents, consultants and advisors to hold, in strict confidence, unless compelled to disclose by judicial or administrative process or, in the opinion of its independent legal counsel, by other requirements of law, all information furnished it by the other party hereto, or their respective representatives, pursuant to this Agreement (except to the extent that such information can be shown to have been (i) available to such Person on a non-confidential basis prior to its disclosure by the other Person, (ii) in the public domain through no fault of such Person or (iii) later lawfully acquired from other sources by the Person to which it was furnished), and no Person shall release or disclose such information to any other Person, except its auditors, attorneys, financial advisors, bankers and other consultants and advisors who shall be bound by the provisions of this Section 19.1. In the event that a subpoena, discovery or other request that arguably calls for production or disclosure of such confidential information is received, the Person receiving such request must promptly notify in writing the Person whose information has been requested. The Person receiving such request shall provide the Person whose confidential information has been requested, a reasonable opportunity to review such information and to assert any rights it may have with respect to the potential disclosure of such confidential information. Each party shall be deemed to have satisfied its obligation to hold confidential information concerning or supplied by the other party hereto, if it exercises the same care as it takes to preserve confidentiality for its own similar information.

ARTICLE XX

Miscellaneous

SECTION 20.1 Dispute Resolution. Except as otherwise specifically provided for herein, any dispute, controversy or claim (or any failure by the parties to agree on a matter as to which this Agreement expressly or implicitly contemplates subsequent agreement by the parties, except for matters left to the sole discretion of a party) arising out of or relating to this Agreement, or the breach, termination or validity hereof or thereof, shall be settled in accordance with the provision of Section 11.12 of the Transaction Agreement.

SECTION 20.2 Documentary Conventions. This Agreement shall be governed by, and construed in accordance with, all the Documentary Conventions.

IN WITNESS WHEREOF, intending to be legally bound, the parties hereto have each caused this Operating Agreement to be duly executed as of the date first above written.

NEW YORK CENTRAL LINES LLC,
as OWNER

By: _____
Name: _____
Title: _____

CSX TRANSPORTATION, INC.,
as OPERATOR

By: _____
Name: _____
Title: _____

SCHEDULE I
to Operating Agreement

ADDRESSES AND PAYMENT INFORMATION

Owner

New York Central Lines LLC

Operator

CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202
Telecopy number: 904-366-5436
Attention: [Name]

DEFINITIONS AND RULES OF USAGE

Rules of Usage

The terms defined below shall have the respective meanings set forth below for all purposes, and such meanings shall be equally applicable to both the singular and plural forms of the terms defined. "Include", "includes" and "including" shall be deemed to be followed by "without limitation" whether or not they are in fact followed by such words or words of like import. "Writing", "written" and comparable terms refer to printing, typing, lithography and other means of reproducing words in a visible form. Any instrument or Applicable Law defined or referred to below or in any instrument that recites it is to be construed in accordance with this Appendix means such instrument or Applicable Law as from time to time amended, modified or supplemented, including (in the case of instruments) by waiver or consent and (in the case of Applicable Laws) by succession of comparable successor Applicable Laws and includes (in the case of instruments) references to all attachments thereto and instruments incorporated therein; *provided*, that any reference to the Bankruptcy Code shall mean the Bankruptcy Code as in effect on the date of reference thereto and applicable to the relevant case. References to any Person are, unless the context otherwise requires, also to its successors and assigns. "Hereof", "herein", "hereunder" and comparable terms refer to the entire instrument in which such terms are used and not to any particular article, section or other subdivision thereof or attachment thereto. References to any gender include, unless the context otherwise requires, references to all genders, and references to the singular include, unless the context otherwise requires, references to the plural and vice versa. "Shall" and "will" have equal force and effect. References in an instrument to "Article", "Section" or another subdivision or to an attachment are, unless the context otherwise requires, to an article, section or subdivision of or an attachment to such instrument.

Definitions

"**Action**" shall mean any action, claim, suit, arbitration, inquiry, subpoena, discovery request, proceeding or investigation by or before any Governmental Authority or forum or authority having jurisdiction over the matter involving or related to any Owner Indemnified Person, any Operator Indemnified Person or the Allocated Assets.

"**Affiliate**" means, with respect to a specified Person, any Person that directly or indirectly controls, is controlled by or is under common control with, the specified Person or any trust for the benefit of such Person or any entities controlled by such Person; *provided* that (a) NYC shall not be an Affiliate of CSX and its Subsidiaries or NSC and its Subsidiaries, (b) PRR shall not be an Affiliate of NSC and its Subsidiaries or CSX and its Subsidiaries and (c) CSX and NSC and their respective Subsidiaries shall not be Affiliates of CRR or CRR Parent and their respective Subsidiaries and vice versa.

"**Agreement**" means the Operating Agreement, dated as of the Closing Date, between the Owner and the Operator.

"Allocated Asset" means the assets identified in or pursuant to the Transaction Agreement as the NYC Allocated Assets other than, as of the Reversion Date, the Reversion Assets.

"Applicable Law" means, with respect to any Person or to any Allocated Asset, all laws, ordinances, judgments, decrees, injunctions, writs and orders of any Governmental Authority and any Governmental Actions applicable to or having jurisdiction over such Person or Allocated Asset.

"Appraisal Procedure" means a procedure whereby an independent third-party appraiser jointly by the Owner and the Operator determines the Fair Market Rental Value of the Allocated Assets or confirms the reasonableness of the fair market value of the Allocated Assets credited to the Settlement Account. The fees and expenses of the appraiser shall be divided equally between the Owner and the Operator.

"arises prior" means that the circumstances giving rise to the liability have transpired prior to the applicable date, whether or not such liability has been discovered, asserted or accrued prior to such date. If the circumstances giving rise to a liability bridge the Closing Date, the parties will apportion it to pre-Closing Date and post-Closing Date periods, with disagreement being subject to the dispute resolution provisions of Section 20.1 of the Agreement.

"Assigned Rights" means Contracts and rights included in the Allocated Assets.

"Bankruptcy Code" means the United States Bankruptcy Code of 1978, as amended from time to time, and the rules and regulations promulgated thereunder.

"Business Day" means any day other than a Saturday, Sunday or other day on which banks are authorized or required to be closed in New York, New York and Richmond, Virginia.

"Closing Date" is the date of this Agreement.

"Contracts" means any contract, lease, loan agreement, deed, easement, license, reversion, mortgage, security agreement, trust indenture or other agreement or instrument to which the Owner is a party or by which it is bound or to which any of the Allocated Assets is subject.

"Contractual Obligation" means, with respect to any Person, any provision of any security issued by such Person or of any Contract to which such Person is a party or by which it or any of its property is bound.

"CRC" means Consolidated Rail Corporation, a Pennsylvania corporation.

"CRR" means Conrail Inc., a Pennsylvania corporation.

"CSX" means CSX Corporation, a Virginia corporation.

"CSXT" means CSX Transportation, Inc., a Virginia corporation.

"Documentary Conventions" means, with respect to an instrument that states in substance that it is governed thereby, that, except as otherwise expressly provided therein:

(a) Documentary Convention—Survival. The representations, warranties and agreements of the parties contained or provided for in such instrument and the parties' obligations under any and all thereof shall survive the execution and delivery of such instrument and the expiration or other termination of the Agreement and shall be and continue in effect notwithstanding the fact that any party may waive compliance with any other term, provision or condition of the Agreement.

(b) Documentary Convention—Governing Law. Such instrument shall become effective upon delivery and shall in all respects be governed by, and construed in accordance with, the laws (excluding principles of conflict of laws) of the Commonwealth of Virginia applicable to agreements made and to be performed entirely within such state, including all matters of construction, validity and performance.

(c) Documentary Convention—Counterparts. Except as otherwise specifically provided in the Agreement, such instrument may be executed by the parties thereto in separate counterparts, each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute but one and the same instrument. To make proof of such instrument, it shall only be necessary to produce one such counterpart executed by each party thereto. All signatures need not be on the same counterpart.

(d) Documentary Convention—Method of Payment. All amounts required to be paid by any party to such instrument to any other party, either thereunder or under the Agreement shall be paid in such immediately available and freely transferable Dollars as at the time of payment shall be legal tender for the payment of public and private debts, by wire transfer, or other method of payment acceptable to the payee, of immediately available funds to the account of the payee set forth in Schedule I to the Agreement or to such other account located in the U.S. as such payee may specify by notice to the other parties.

(e) Documentary Convention—Parties in Interest; Limitation on Rights of Others. The terms of such instrument shall be binding upon, and inure to the benefit of, the parties thereto and their permitted successors and assigns. Nothing in such instrument shall be construed to give any Person (other than the parties thereto and their permitted successors and assigns and as expressly provided therein) any legal or equitable right, remedy or claim under or in respect of such instrument or any covenants, conditions or provisions contained therein.

(f) Documentary Convention—Table of Contents; Headings. The table of contents, if any, and headings, if any, of the various articles, sections and other subdivisions of such instrument are for convenience of reference only and shall not modify, define or limit any of the terms or provisions of such instrument. To the extent of any inconsistency between the headings and any text, such text shall govern.

(g) Documentary Convention—Entire Agreement; Amendment and Waiver. The Agreement, the other Ancillary Agreements and the Transaction Agreement constitute the entire agreement of the parties thereto with respect to the subject matter thereof and supersede all prior written and oral agreements and understandings with respect to such subject matter. Neither the Agreement nor any of the terms hereof may be terminated, amended, supplemented, waived or modified orally, but only by an instrument in writing signed by the party against which the enforcement of the termination, amendment, supplement, waiver or modification shall be sought and subject to any other limitations on amendments set forth in the Agreement, the other Ancillary Agreements and the Transaction Agreement. Any amendment, modification or supplement to the Agreement shall be subject to any applicable Governmental Action. No failure or delay of any party in exercising any power or right under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any such right or power, or any abandonment or discontinuance of steps to enforce such a right or power, preclude any other or further exercise thereof or the exercise of any other right or power.

(h) Documentary Convention—Severability. Any provision of such instrument that shall be prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions thereof and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction. To the extent permitted by Applicable Law, the parties to such instrument waive any provision of law that renders any provision thereof prohibited or unenforceable in any respect.

(i) Documentary Convention—Notices. All notices, consents, directions, approvals, instructions, requests and other communications required or permitted by the terms of such instrument to be given to any Person shall be in writing, and any such notice shall become effective five (5) Business Days after being deposited in the mails, certified or registered, with appropriate postage prepaid for first class mail or, if delivered by hand or courier service or in the form of a telecopy, when received, and shall be directed to the address or telecopy number of such Person set forth in Schedule I to the Agreement. From time to time any party to such instrument may designate a new address or telecopy number for purposes of notice thereunder by notice to each of the other parties thereto, effective when received.

(j) Documentary Convention—Payment on Business Days. If any payment under such instrument is required to be made on a day other than a Business Day, the date of payment shall be extended to the next Business Day without any additional interest for such extension period so long as payment is made on such Business Day.

"Dollars" or "\$" means dollars in the lawful currency of the United States of America..

"Event of Default" has the meaning set forth in Section 14.1 of the Agreement.

"Event of Loss" means, with respect to any Allocated Asset, the occurrence of any of the following events: (a) the loss or theft of such Allocated Asset to the extent that such Allocated Asset is not recovered within one hundred eighty (180) days of such event or, if earlier, the expiration of the Term, (b) the destruction of or damage to such Allocated Asset or any part thereof to such extent as shall render repair of such Allocated Asset uneconomical to the Operator or unfit or unsuitable for its intended use, which destruction or damage is an actual or constructive total loss, (c) the requisition of use of such Allocated Asset for an indefinite period or for a stated period in excess of one hundred eighty (180) days or, if earlier, which ends later than the expiration of the Term by any Governmental Authority under power of eminent domain or otherwise, (d) the condemnation, confiscation, seizure or requisition of title to such Allocated Asset by a Governmental Authority, (e) any damage to such Allocated Asset which results in an insurance settlement on the basis of an actual or constructive total loss, (f) the prohibition by Applicable Law of the use of such Allocated Asset by the Operator or any other Person for a period of one hundred eighty (180) consecutive days from the date of such prohibition or, if earlier, the end of the Term. The date of occurrence of an Event of Loss in respect of any Allocated Asset shall be deemed to be, (1) in the event of damage to such item, the date of such damage, (2) in the event of a condemnation or requisition of title by a Governmental Authority, the date thereof, and (3) in the event of an Event of Loss under clause (a), (c) or (f) of the first sentence of this definition, the date of expiration of the period referred to in said clause.

"Excluded Taxes" has the meaning set forth in Section 3.5 of the Agreement.

"Fair Market Rental Value" means, as to the Allocated Assets, the fair market rental value that would be obtained in an arm's length transaction between an informed and willing lessee and an informed and willing lessor, in either case under no compulsion to lease, for the lease of the Allocated Assets, disregarding the fact (if applicable) that the Allocated Assets are subject to the Agreement and assuming that Article VII of the Agreement shall have been complied with in all respects. Subject to the foregoing, the Fair Market Rental Value as to the Allocated Assets shall be such value determined in accordance with the Appraisal Procedure.

"Fees and Expenses" means, with respect to any Person in connection with any transaction or occurrence, the reasonable fees and expenses of its legal counsel for such transaction or occurrence.

"Governmental Action" means all authorizations, consents, approvals, waivers, exceptions, variances, franchises, permissions, permits and licenses of, and filings and declarations with, Governmental Authorities.

"Governmental Authority" means any federal, state, municipal, county, local or foreign governmental Person, authority or agency, court, regulatory commission, stock exchange or other similar body.

"Income Tax Regulations" means the regulations promulgated by the U.S. Department of the Treasury pursuant to the Code.

"Indemnifying Party" means a Person who requires or requests indemnification under Article XI of the Agreement.

"Indemnified Party" means any Owner Indemnified Person or Operator Indemnified Person.

"Insolvency Proceeding" means any case or proceeding under bankruptcy, insolvency, reorganization, receivership, moratorium or other laws providing relief to debtors.

"Lien" means any lien, mortgage, encumbrance, pledge, charge, lease, easement, servitude or security interest or any interests similar to the foregoing, including those existing under any conditional sales or other title retention agreement or the filing of or agreement to deliver any financing statement under the UCC.

"Modification" means, with respect to any Allocated Asset, any modification, alteration, addition, upgrade or improvement to such Allocated Asset.

"Nonseverable Modification" means any Required Modification and any Modification which is not readily removable without impairing the fair market value, residual value, condition, remaining useful life or utility of the Allocated Asset to which such Modification relates immediately prior to such Modification.

"NSC" means Norfolk Southern Corporation, a Virginia corporation.

"NSR" means Norfolk Southern Railway Company, a Virginia corporation.

"NYC" means New York Central Lines LLC, a Delaware limited liability company.

"Obsolescence Termination Payment" has the meaning set forth in Section 8.2 of the Agreement.

"Operating Fee" means the operating fee agreed to from time to time by the Owner and Operator based on the Fair Market Rental Value of the Allocated Assets as set forth in a supplement to this Agreement.

"Operator" means CSXT or any permitted successor or assign.

"Operator Indemnified Person" has the meaning set forth in Section 11.2 of the Agreement.

"Optional Modification" has the meaning set forth in Section 7.2(a) of the Agreement.

"Organic Document" means, with respect to any Person, as applicable, the certificate or articles of incorporation, partnership agreement, limited liability company agreement, certificate of

formation, membership agreement, by-laws and all other organizational documents of such Person.

"Overdue Rate" means the rate equal to the lesser of (i) the prime rate set forth in *The Wall Street Journal* and (ii) the maximum rate allowed by Applicable Law.

"Owner" means NYC, a Delaware limited liability company.

"Owner Indemnified Person" has the meaning set forth in Section 11.1 of the Agreement.

"Owner Lien" means a Lien (i) which results from acts of, or any failure to act by, or as a result of claims against, the Owner, (ii) in favor of any taxing authority by reason of the non-payment by the Owner, or (iii) which results from acts of, or any failure to act by, the Owner in violation of its obligations under the Agreement.

"Payment Date" means each March 31, June 30, September 30 and December 31 or, if such day is not a Business Day, the next succeeding Business Day.

"Permitted Liens" means, with respect to any Allocated Asset,

- (a) The respective rights and interests of the Operator and Owner under the Agreement,
- (b) Owner Liens,
- (c) Liens for Taxes which are not yet due or so long as no Event of Default shall have occurred and be continuing are being contested in good faith by appropriate proceedings which suspend the collection thereof; *provided*, that such proceedings shall not involve any material danger of the sale, forfeiture or loss of such Allocated Asset or any part thereof or interest therein or the reasonably foreseeable risk of imposition of any criminal liability on the Owner or any other material liability not indemnified against by the Operator,
- (d) Liens of mechanics, materialmen, laborers, employees or suppliers and similar Liens arising by operation of law, in each case incurred by the Operator in the ordinary course of business for sums that are not overdue for more than sixty (60) days or so long as no Event of Default shall have occurred and be continuing are being contested in good faith by negotiations or by appropriate proceedings which suspend the collection thereof; *provided*, that such contest does not involve any material danger of the sale, forfeiture or loss of such Allocated Asset or any part thereof or interest therein or the reasonably foreseeable risk of imposition of any criminal liability on the Owner or any other material liability not indemnified against by the Operator,
- (e) Liens arising out of any judgments or awards against the Operator with respect to which (i) at the time an appeal or proceeding for review is being prosecuted in good faith, (ii) there shall have been secured a stay of execution pending such appeal or proceeding for

review, (iii) during such proceeding there is not, and such proceeding does not involve, any material danger of the sale, forfeiture or loss of such Allocated Asset or any part thereof or any interest therein or the risk of imposition of any criminal liability on the Owner or any other liability not indemnified against by the Operator, and (iv) if such Liens have specifically attached to any Allocated Asset, the Operator has provided the Owner with security reasonably satisfactory to the Owner, in the amount of such claims,

(f) Liens, rights of way, easements and other rights to use the Allocated Assets (including licenses for private crossings) common in the railroad industry arising out of the ordinary course of business of the Operator,

(g) the rights and interests of any permitted Qualified Sub-Operator, and

(h) Liens consented to by the Owner.

"Person" shall mean any individual, corporation, partnership, limited liability company, joint venture, association, joint-stock company, trust, unincorporated organization, government or any agency or political subdivision thereof or any other entity.

"PRR" means Pennsylvania Lines LLC, a Delaware limited liability company.

"Renewal Notice" has the meaning set forth in Section 17.1(a) of the Agreement.

"Renewal Operating Fee" has the meaning set forth in Section 17.1(b) of the Agreement.

"Renewal Term" has the meaning set forth in Section 17.1(a) of the Agreement.

"Required Modification" has the meaning set forth in Section 7.2(a) of the Agreement.

"Reversion Assets" has the meaning set forth in Section 2.3 of the Agreement.

"Reversion Date" has the meaning set forth in Section 2.3 of the Agreement.

"Reversion Notice" has the meaning set forth in Section 2.3 of the Agreement.

"Settlement Account" has the meaning set forth in Section 6.1 of the Agreement.

"Settlement Account Payment Date" has the meaning set forth in Section 6.2 of the Agreement.

"Severable Modification" means any Modification which is not a Nonseverable Modification.

"Sub-Operating Agreement" has the meaning set forth in Section 12.1(a) of the Agreement.

"Substantial Allocated Asset" means (i) an Allocated Asset with a fair market value in excess of \$10 million or (ii) a group of Allocated Assets that (a) are sold, transferred or otherwise disposed of during any calendar year to the same Person (including Affiliates of such Person) or the same group of Persons (including Affiliates of such Persons) and (b) have an aggregate fair market value in excess of \$10 million.

"Supplemental Operating Fees" means all amounts payable by the Operator pursuant to the terms of the Agreement, including indemnities payable by the Operator pursuant to Section 11.1 hereof, other than the Operating Fee.

"Tax" means all taxes (including income, franchise, excise, real and personal property, sales, use, payroll and withholding and other taxes) imposed by any federal, state, local, foreign or international taxing authority or Governmental Authority, whether in the form of assessments, levies, imposts, duties, charges, assessments, withholdings or otherwise, now existing or hereafter created or adopted, together with all interest, penalties and additions imposed with respect to such amounts.

"Term" means the period commencing on the Closing Date and terminating on the 25th anniversary thereof.

"Termination Date" means the date on which the Term terminates.

"Third Party Claim" has the meaning set forth in Section 11.3(b) of the Agreement.

"Third Party Provider" has the meaning set forth in Section 4.2(a) of the Agreement.

"Transaction Agreement" means the Transaction agreement among CSX, CSXT, NSC, NSR, CRC, CRR and CRR Holdings LLC dated as of June 10, 1997.

"UCC" means the Uniform Commercial Code as enacted and in effect from time to time in any applicable jurisdiction.

"Valuation Date" means: (i) the Closing Date, (ii) the sixth (6th), twelfth (12th), eighteenth (18th), and twenty-fourth (24th) anniversaries of the Closing Date, (iii) the first day of each Renewal Term; (iv) the sixth (6th) anniversary of the first day of each Renewal Term, (v) a Settlement Account Payment Date (if not already a Valuation Date pursuant to other clauses of this definition), and (vi) such other dates as the parties hereto may agree.

EXHIBIT A-2

Exhibit 4

OPERATING AGREEMENT

dated as of [the Closing Date]

by and between

PENNSYLVANIA LINES LLC

as *Owner*,

and

NORFOLK SOUTHERN RAILWAY COMPANY

as *Operator*

TABLE OF CONTENTS

	Page
ARTICLE I	
Definitions and Usage	1
SECTION 1.1 Definitions and Usage	1
ARTICLE II	
Operation of Allocated Assets	1
SECTION 2.1 Operation of Allocated Assets	1
SECTION 2.2 Term of Agreement	1
SECTION 2.3 Reversion Assets	1
ARTICLE III	
Operating Fee and Certain Expenses	2
SECTION 3.1 Operating Fee; Supplemental Operating Fees.	2
SECTION 3.2 Method of Payment	2
SECTION 3.3 Late Payment	2
SECTION 3.4 No Set-off, Counterclaims, etc.	2
SECTION 3.5 Tax Provisions	4
ARTICLE IV	
Representations, Warranties and Agreements	5
SECTION 4.1 Disclaimer of Warranties.	5
SECTION 4.2 Operator To Exercise Certain Rights	6
SECTION 4.3 Representations and Warranties of the Operator	7
SECTION 4.4 Representations and Warranties of the Owner	7
ARTICLE V	
Liens; Quiet Enjoyment	8
SECTION 5.1 Liens.	8
SECTION 5.2 Quiet Enjoyment	8
ARTICLE VI	
Settlement Account	8
SECTION 6.1 Maintenance of Settlement Account	8
SECTION 6.2 Payment of Settlement Account Balance	8
SECTION 6.3 Confirmation of Settlement Account	9

ARTICLE VII

Operation; Maintenance	9
SECTION 7.1 Operation and Maintenance	9
SECTION 7.2 Modification	10

ARTICLE VIII

Obsolescence Termination; Abandonment	11
SECTION 8.1 Obsolescence Termination; Abandonment	11
SECTION 8.2 Conditions of Termination	12

ARTICLE IX

Termination	12
SECTION 9.1 Termination	12
SECTION 9.2 Owner Assignment, Lease or Sale of Allocated Asset	12
SECTION 9.3 Governmental Approvals	12
SECTION 9.4 Severable Modifications	12

ARTICLE X

Loss, Destruction, Condemnation, Damage, etc.	13
SECTION 10.1 Replacement; Payment	13
SECTION 10.2 Applications During Event of Default	14
SECTION 10.3 Application of Article VII	14

ARTICLE XI

Indemnities	14
SECTION 11.1 Indemnity by Operator	14
SECTION 11.2 Indemnity by Owner	15
SECTION 11.3 Indemnification Procedures	15

ARTICLE XII

Assignments; Sub-Operating Agreements	16
SECTION 12.1 Operator Assignments	16
SECTION 12.2 Merger, Consolidation, Etc.	16
SECTION 12.3 Owner Assignments	16

ARTICLE XIII

Inspection; Markings	17
SECTION 13.1 Rights to Information.	17
SECTION 13.2 Markings	17

ARTICLE XIV

Events of Default	17
SECTION 14.1 Events of Default.	17

ARTICLE XV

Remedies	18
SECTION 15.1 Remedies.	18
SECTION 15.2 Owner Rights.	19
SECTION 15.3 Exercise of Other Rights or Remedies	19
SECTION 15.4 Subject to Governmental Action	19

ARTICLE XVI

Right to Perform	20
SECTION 16.1 Right to Perform	20

ARTICLE XVII

Renewal Options	20
SECTION 17.1 Renewal Notice.	20

ARTICLE XVIII

Certain Notices and Information	21
SECTION 18.1 Notice of Event of Default	21
SECTION 18.2 Information Regarding Allocated Assets	21

ARTICLE XIX

Confidentiality	21
SECTION 19.1 Confidentiality.	21

ARTICLE XX

Miscellaneous	22
SECTION 20.1 Dispute Resolution	22
SECTION 20.2 Documentary Conventions.	22

Schedule

Schedule I: Addresses and Payment Information

Appendix

Appendix A: Definitions

OPERATING AGREEMENT

This **OPERATING AGREEMENT** (this "Agreement") is entered into as of [Closing Date], by and between Pennsylvania Lines LLC, a Delaware limited liability company, as Owner and Norfolk Southern Railway Company, a Virginia Corporation, as Operator.

ARTICLE I

Definitions and Usage

SECTION 1.1 Definitions and Usage. Unless the context otherwise requires, capitalized terms used herein shall have the respective meanings assigned to them in Appendix A to this Agreement. Terms used, but not defined, in this Agreement or in Appendix A shall have the respective meanings assigned to them in the Transaction Agreement.

ARTICLE II

Operation of Allocated Assets

SECTION 2.1 Operation of Allocated Assets. (a) The Owner hereby agrees with the Operator, and the Operator hereby agrees with the Owner, that the Operator shall have the license, right and obligation to use and operate the Allocated Assets for the term referred to in Section 2.2 hereof on the terms and conditions set forth in this Agreement. Except as otherwise specifically provided in this Agreement, the Operator may use and operate the Allocated Assets in such manner and for such purposes as the Operator considers necessary or appropriate.

(b) The Owner hereby agrees that the Operator shall, effective as of the Closing Date, have the right to receive and retain for its own benefit and use and in its own name all revenues, tolls, rents, receipts, issues, profits and income of every character arising from or associated with the operation and use of the Allocated Assets.

SECTION 2.2 Term of Agreement. Immediately upon the execution hereof, without necessity of any further act or evidence by either party hereto, the Allocated Assets shall be deemed delivered by the Owner to the Operator for the Term and, if the Operator elects to exercise its renewal option pursuant to Article XVII hereof, for any Renewal Term, in either case, all pursuant to the terms of this Agreement, unless this Agreement shall have been earlier terminated in accordance with its terms.

SECTION 2.3 Reversion Assets. Within one (1) year after the Closing Date, the Owner may, with the consent of the Operator, deliver to the Operator a notice electing to terminate the application of this Agreement to certain Allocated Assets (the "Reversion Notice"). The Reversion Notice shall set forth (i) a list of those Allocated Assets selected by the Owner in its sole discretion which will no longer be subject to this Agreement (the "Reversion Assets"), and (ii) the date as of which such Reversion Assets shall no longer be subject to this Agreement,

which date shall be a Payment Date and shall not be less than sixty (60) calendar days after the date of the Reversion Notice (the "Reversion Date"); *provided*, that the fair market value of the Reversion Assets shall not exceed 25% of the aggregate fair market value of all Allocated Assets (including the Reversion Assets) as of the Reversion Date. All Allocated Assets other than the Reversion Assets shall continue after the Reversion Date to be subject to the terms and conditions of this Agreement.

ARTICLE III

Operating Fee and Certain Expenses

SECTION 3.1 Operating Fee; Supplemental Operating Fees. The Operator shall pay to the Owner the Operating Fee commencing on the first Payment Date and on each Payment Date thereafter for the duration of the Term and any Renewal Term. Subject to any applicable Governmental Action, the Operating Fee shall be recalculated on each Valuation Date to reflect the Fair Market Rental Value of the Allocated Assets then subject to this Agreement. Supplemental Operating Fees shall be paid by the Operator when due under the terms of this Agreement.

SECTION 3.2 Method of Payment. All Operating Fees and Supplemental Operating Fees shall be paid by the Operator to the Owner at its office set forth in Schedule I hereto or at such other place in the U.S. as the Owner shall specify in a written notice to the Operator at least five (5) Business Days prior to the date such payment is due. Each payment of Operating Fees and Supplemental Operating Fees shall be made by the Operator in immediately available funds prior to 12:00 noon, New York time at the place of payment, on the date when such payment shall be due.

SECTION 3.3 Late Payment. In the event any Operating Fees or Supplemental Operating Fees shall not be paid on its due date to the Owner, the Operator shall pay to the Owner on written demand, interest (to the extent permitted by Applicable Law) on such overdue amount from the due date thereof (without regard to any grace period) to the date of payment thereof at the Overdue Rate.

SECTION 3.4 No Set-off, Counterclaims, etc. THIS AGREEMENT IS A NET AGREEMENT. THE OPERATOR'S OBLIGATION TO PAY ALL PAYMENTS OF OPERATING FEES AS AND WHEN THE SAME SHALL BECOME DUE AND PAYABLE IN ACCORDANCE WITH THE TERMS OF THIS AGREEMENT SHALL BE ABSOLUTE AND UNCONDITIONAL AND SHALL NOT BE SUBJECT TO ANY ABATEMENT OR DIMINUTION BY SET-OFF, DEDUCTION, COUNTERCLAIM, RECOUPMENT, AGREEMENT, DEFENSE, SUSPENSION, DEFERMENT, INTERRUPTION OR OTHERWISE, AND UNTIL SUCH TIME AS ALL AMOUNTS REQUIRED TO BE PAID UNDER THIS AGREEMENT SHALL HAVE BEEN PAID, THE OPERATOR SHALL NOT

HAVE ANY RIGHT TO TERMINATE THIS AGREEMENT OR TO BE RELEASED, RELIEVED OR DISCHARGED FROM ITS OBLIGATION TO MAKE, AND SHALL NOT SUSPEND, REDUCE OR DISCONTINUE, ANY PAYMENT OF OPERATING FEES FOR ANY REASON WHATSOEVER (EXCEPT AS MAY BE EXPRESSLY PROVIDED HEREIN), including, without limitation:

(a) any default, misrepresentation, negligence, misconduct or other action or inaction of any kind by the Owner or any other Person, whether under or in connection with this Agreement or any other agreement relating to this Agreement or in connection with any unrelated transaction;

(b) the insolvency, bankruptcy, reorganization or cessation of existence, or discharge or forgiveness of indebtedness of any Person referred to in clause (a) above;

(c) the invalidity, unenforceability or impossibility of performance of this Agreement for any reason;

(d) any defect in the title, condition, design, operation or fitness for use of, or any Lien or other restriction of any kind upon, all or any part of any Allocated Asset, any loss or destruction of, or damage to, any Allocated Asset or any interruption in or cessation of the ownership, possession, operation or use of any Allocated Asset for any reason whatsoever;

(e) any restriction, prevention or curtailment of or interference with any Allocated Asset or the use thereof or any part thereof for any reason whatsoever, including, without limitation, by any Governmental Authority;

(f) any Applicable Law now or hereafter in force;

(g) any failure to obtain any required Governmental Action for a transfer of rights or title to the Owner, the Operator or any other Person;

(h) any amendment or other change of, or any assignment of any rights under, this Agreement, or any waiver or other action or inaction under or in respect of this Agreement, or any exercise or nonexercise of any right or remedy under or in respect of this Agreement; and

(i) any other cause, circumstance, happening or event whatsoever, foreseen or unforeseen, whether similar or dissimilar to any of the foregoing.

The Operator hereby waives and hereby agrees to waive at any future time at the request of the Owner, to the extent now or then permitted by Applicable Law, any and all rights that the Operator may have or that at any time hereafter may be conferred upon it, by statute, regulation or otherwise, to terminate, cancel, quit or surrender this Agreement other than in accordance with the express terms hereof. Each Operating Fee payment shall be final and the Operator agrees not

to seek to recover all or any part of any such payment (except for amounts paid to the Owner which the Owner in good faith agrees have been paid in error) from the Owner for any reason under any circumstance whatsoever.

SECTION 3.5 Tax Provisions. (a) During the Term and any Renewal Term, the Operator shall pay when due, all Taxes, other than Excluded Taxes (as hereinafter defined), imposed on the Owner, based upon the Allocated Assets or arising out of the use, lease, possession or operation of the Allocated Assets during that period. For purposes of this Section, (i) Owner shall mean the Owner and its Affiliates and (ii) Excluded Taxes shall mean (A) all Taxes based, in whole or in part, on net income or gross income (including, without limitation, any minimum tax) of the Owner or which are in substitution for, or relieve the Owner from, any Tax based upon or measured by the Owner's net income or gross income, together with any interest, penalties, additions to tax or additional amounts that may become payable in respect thereof; (B) business and occupation taxes, and gross receipts taxes of the Owner and Taxes based upon the equity interests of the Owner; and (C) interest, fines and penalties to the extent due to the acts or omissions of the Owner in connection with Excluded Taxes. The Operator shall not be required to pay any Tax it is obligated to pay under the provisions of this Section 3.5 during the time it shall reasonably and in good faith and by appropriate legal or administrative proceedings contest the validity or amount thereof.

(b) The Owner shall have the right and obligation, at its own expense, to prepare and file all Tax returns required to be filed by the Owner under Applicable Law. Prior to the Owner's filing of any Tax returns for Taxes required to be paid by the Operator under paragraph (a) of this Section 3.5, the Owner shall provide such returns to the Operator for its review and approval, which approval will not be unreasonably withheld or delayed.

(c) The Operator and its assignees and designees shall have the right (but only to the extent the Owner shall have such right, by contract or otherwise) to control at its expense any audit or examination by any Governmental Authority, or any judicial proceeding, relating to any Taxes required to be paid by it under paragraph (a) of this Section 3.5.

(d) During the Term and any Renewal Term, the Operator and any of its designees shall be entitled to claim federal, state and local tax benefits (including, without limitation, deductions and credits) arising out of Operator's expenditures in the use, possession or operation of the Allocated Assets by the Operator, or any of its respective assignees or designees, and the improvements thereto, that the Operator, or any of its designees is entitled to claim under federal, state and local laws and regulations. These tax benefits include but are not limited to: (i) deductions for depreciation or amortization attributable to property (both tangible and intangible) owned by the Operator, or any of its assignees or designees, including improvements made to any of the Allocated Assets by any of them, as well as expenditures made by any of them that are required to be capitalized under sections 263 or 263A or some other section of the Code; (ii) deductions for expenditures made by the Operator, or any of its assignees or designees, deductible as ordinary and necessary business expenses under section 162 of the Code; (iii)

deductions for losses attributable to property (both tangible and intangible) owned by the Operator, or any of its assignees or designees, deductible under section 165 of the Code; and (iv) any federal, state or local credits applicable to the use, lease, possession or operation of the Allocated Assets by the Operator, or any of its assignees or designees, and improvements thereto. The Owner is entitled to deductions for Taxes of the Owner paid by the Operator under paragraph (a) of this Section 3.5 and treated as rent paid by the Operator under this Agreement and taxable income received by the Owner under section 1.162-11(a) of the Income Tax Regulations.

ARTICLE IV

Representations, Warranties and Agreements

SECTION 4.1 Disclaimer of Warranties. AS BETWEEN THE OWNER AND THE OPERATOR, THE EXECUTION OF THIS AGREEMENT SHALL BE CONCLUSIVE PROOF OF ACCEPTANCE BY THE OPERATOR OF EACH ALLOCATED ASSET AS BEING IN COMPLIANCE WITH ALL REQUIREMENTS OF THIS AGREEMENT. THE OWNER AND THE OPERATOR TAKE EACH SUCH ALLOCATED ASSET "AS IS" AND "WHERE IS", AND THE OPERATOR ACKNOWLEDGES THAT THE OWNER HAS NOT MADE, NOR SHALL BE DEEMED TO HAVE MADE, ANY REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, AS TO THE TITLE, VALUE, COMPLIANCE WITH SPECIFICATIONS, CONDITION, MERCHANTABILITY, DESIGN, QUALITY, DURABILITY, OPERATION OR FITNESS FOR USE OR PURPOSE OF EACH SUCH ALLOCATED ASSET OR ANY OTHER REPRESENTATION OR WARRANTY WHATSOEVER, EXPRESS OR IMPLIED, WITH RESPECT TO EACH SUCH ALLOCATED ASSET OR OTHERWISE, IT BEING AGREED THAT ALL RISKS INCIDENT THERETO ARE TO BE BORNE, AS BETWEEN THE OWNER AND THE OPERATOR, BY THE OPERATOR IN THE EVENT OF ANY DEFECT OR DEFICIENCY IN ANY SUCH ALLOCATED ASSET, OF ANY NATURE WHETHER PATENT OR LATENT, AND THAT THE OWNER SHALL NOT HAVE ANY RESPONSIBILITY OR LIABILITY WITH RESPECT THERETO, except that the Owner hereby represents, warrants and covenants that each such Allocated Asset shall be free of Owner Liens on the Closing Date and except as otherwise provided in the Transaction Agreement. The provisions of this Section 4.1 have been negotiated, and the foregoing provisions are intended to be a complete exclusion and negation of any other warranties made by the Owner, express or implied, with respect to any Allocated Asset, whether arising pursuant to Applicable Law now or hereafter in effect or otherwise. Nothing contained in this Section 4.1 shall in any way diminish or otherwise affect any right the Operator may have with respect to any Allocated Asset against any third Person. The Owner shall not at any time be required to inspect any Allocated Asset, and any actual inspection by the Owner shall not be deemed to affect or modify the provisions of this Section 4.1.

SECTION 4.2 Operator To Exercise Certain Rights. (a) The Owner hereby authorizes the Operator, at the Operator's expense, to exercise in the name of and on behalf of the Owner and the Operator, as their interests may appear, the right and power to deal with any third party lessor, lessee, licensor, licensee, seller, manufacturer, shipper or any other Persons (including agents and consultants thereof) with respect to any Allocated Asset or who are party to any Assigned Rights (each a "Third Party Provider") and the right to enforce (by legal action or otherwise) against such Third Party Provider all rights, powers and privileges of the Owner and to receive all benefits of the Owner with respect to such Third Party Provider, under any Contract, express or implied warranty, indemnity or otherwise; *provided*, that if an Event of Default shall have occurred and be continuing (and until all Events of Default, then outstanding shall no longer be continuing) the Owner may terminate the authority of the Operator under this Section 4.2. Any amount paid to the Owner or Operator pursuant to the Operator's exercise of its authority under this Section 4.2 shall be paid to the Operator. After the end of the Term or any Renewal Term with respect to any Allocated Asset or after the termination of this Agreement with respect to such Allocated Asset pursuant to Article XIV, (a) the Operator shall have no further rights, powers, privileges or benefits under this Section 4.2 and (b) all amounts payable by any Third Party Provider paid with respect to periods arising thereafter shall be paid to, and retained by, the Owner or any other Person as shall then be the owner of the Allocated Asset as to which such payment is made.

(b) The Operator shall, with the Owner's prior consent, have the right and power to execute and deliver on behalf of the Owner, the extension, renewal, amendment or modification of any Assigned Rights or any other Contract in respect of the Allocated Assets.

(c) The Owner shall as expeditiously as possible use its reasonable efforts to obtain or transfer to the Operator any Governmental Action or the consent, authorization, or approval of any private Person required to be made, obtained or transferred to effectuate the purposes of this Agreement and the transactions contemplated herein, which actions shall include furnishing all information required under or in connection with such Governmental Action or the approvals of, or filing with such private Person.

(d) The Operator shall pay, perform and discharge fully all of the obligations of the Owner or its Affiliates under all Assigned Rights and Contracts that are Allocated Assets from and after the Closing Date. The Owner or its Affiliates shall, without further consideration therefor, pay, assign and remit promptly to the Operator, as appropriate, all monies, rights and other consideration received in respect of such performance. The Owner or its Affiliates shall exercise or exploit the rights and options under all such Contracts only as reasonably directed by the Operator.

SECTION 4.3 Representations and Warranties of the Operator. The Operator represents and warrants to the Owner as of the Closing Date as follows:

- (a) Due Organization, etc. The Operator (i) is a corporation duly organized and validly existing under the laws of the Commonwealth of Virginia, (ii) has the power and authority to enter into and perform its obligations under this Agreement and (iii) has obtained all Governmental Action required to use or hold the Allocated Assets in accordance with this Agreement, and to enter into and perform its obligations under this Agreement.
- (b) Due Authorization, Non-Contravention, etc. The execution, delivery and performance of this Agreement have been duly authorized by all necessary corporate action on the part of the Operator, do not and will not conflict with, result in any violation of, or constitute any default under, any provision of any Organic Document of the Operator or Applicable Law.
- (c) Due Execution. This Agreement has been duly executed and delivered by the Operator, and constitutes the legal, valid and binding obligation of the Operator enforceable against the Operator in accordance with its terms, except as enforcement may be limited by bankruptcy, insolvency, reorganization or other laws of general application relating to or affecting the enforcement of creditors' rights and except that the availability of equitable remedies, including specific performance, is subject to the discretion of the court before which any proceeding therefor may be brought.

SECTION 4.4 Representations and Warranties of the Owner. The Owner represents and warrants to the Operator as of the Closing Date as follows:

- (a) Due Organization, etc. The Owner (i) is a limited liability company duly organized and validly existing under the laws of the State of Delaware, (ii) has the power and authority to enter into and perform its obligations under this Agreement and (iii) has obtained all Governmental Action required to enter into and perform its obligations under this Agreement.
- (b) Due Authorization, Non-Contravention, etc. The execution, delivery and performance of this Agreement have been duly authorized by all necessary company action on the part of the Owner, do not and will not conflict with, result in any violation of, or constitute any default under, any provision of any Organic Document of the Owner or Applicable Law.
- (c) Due Execution. This Agreement has been duly executed and delivered by the Owner, and constitutes the legal, valid and binding obligation of the Owner enforceable against the Owner in accordance with its terms, except as enforcement may be limited by bankruptcy, insolvency, reorganization or other laws of general application relating to or affecting the enforcement of creditors' rights and except that the availability of equitable remedies, including specific performance, is subject to the discretion of the court before which any proceeding therefor may be brought.

ARTICLE V

Liens; Quiet Enjoyment

SECTION 5.1 Liens. The Operator shall not directly or indirectly create, incur, assume or suffer to exist any Lien (other than Permitted Liens) on any Allocated Asset. The Operator will promptly, at its own expense, take such action as may be necessary duly to discharge any such Lien. The Operator's obligations under this Section 5.1 with respect to any such Lien on any Allocated Asset resulting from a claim arising prior to the termination of this Agreement with respect to such Allocated Asset shall survive such termination. The Operator agrees that, upon the termination of this Agreement, the Allocated Assets shall be returned to the Owner free and clear of Liens, other than Owner Liens.

SECTION 5.2 Quiet Enjoyment. Notwithstanding any other provision of this Agreement, so long as no Event of Default shall have occurred and be continuing, as between the Operator and Owner, the Operator shall have the exclusive rights to possession, control and use of all Allocated Assets and neither the Owner nor any Person acting or claiming through the Owner will take any action that shall interfere with the peaceful and quiet enjoyment or the possession and use or nonuse of any Allocated Asset by the Operator, and the Operator shall have the right to possess and use or not use such Allocated Asset in its sole discretion, subject always to the terms and conditions of this Agreement. The foregoing is not intended to limit the inspection rights of the Allocated Assets granted by the Operator pursuant to Section 12.1 hereof.

ARTICLE VI

Settlement Account

SECTION 6.1 Maintenance of Settlement Account. The Operator shall maintain a non-cash book account (the "Settlement Account") to reflect amounts owed by the Operator to the Owner as a result of transactions described in Sections 7.1(e), 8.1 and 10.1(a)(ii) hereof.

SECTION 6.2 Payment of Settlement Account Balance. The Operator shall pay to the Owner an amount equal to the then balance of the Settlement Account upon: (i) the sixth (6th), twelfth (12th), eighteenth (18th) and twenty-fourth (24th) anniversaries of the Closing Date, (ii) the expiration of the Term (or, if earlier, the termination of this Agreement), (iii) the sixth (6th) anniversary of the first day of each Renewal Term, (iv) the end of each Renewal Term (or, if earlier, the termination of this Agreement), (v) the Reversion Date (but only with respect to the Reversion Assets), and (vi) thirty (30) calendar days after the date on which a Substantial Allocated Asset (a) is not repaired or replaced under Section 7.1(e) hereof, (b) is abandoned, sold or otherwise disposed of under Section 8.1 hereof or (c) suffers an Event of Loss and is not replaced under Section 10.1(a)(i) hereof (each, a "Settlement Account Payment Date").

SECTION 6.3 Confirmation of Settlement Account. Within ten (10) days prior to a Settlement Account Payment Date, the Appraisal Procedure shall be used to confirm that credits to the Settlement Account were based on the fair market value of the relevant Allocated Assets consistent with the terms of this Agreement. The Settlement Account shall be adjusted consistent with the outcome of the Appraisal Procedure and the payments made pursuant to Section 6.2 hereof shall reflect any such adjustments.

ARTICLE VII

Operation; Maintenance

SECTION 7.1 Operation and Maintenance. The Operator shall at all times at its own expense during the Term:

- (a) use the Allocated Assets in such manner and for such purposes as the Operator considers necessary or appropriate in connection with the operation of its business;
- (b) keep and maintain such books, records and title documents relating to the Allocated Assets, and the acquisition, construction and installation of Modifications thereto and the payment of the purchase price of such Modifications, as the Operator considers appropriate consistent with the Operator's customary business practices;
- (c) maintain the Allocated Assets in accordance with the Operator's customary practice;
- (d) inspect, service, maintain, store, use, operate, repair, replace, modify and improve the Allocated Assets in compliance in all material respects with Applicable Law (including all applicable environmental and occupational safety laws), and in compliance in all material respects with all applicable licenses and permits relating to the Allocated Assets issued by any Governmental Authority; *provided*, the Operator may in good faith by appropriate proceedings contest the validity or application of any such Applicable Law in any reasonable manner which does not involve any risk of the imposition of criminal liability on the Owner, or any material danger of any fine, penalty, or other imposition upon the Owner for which the Operator has not acknowledged its obligation to indemnify the Owner pursuant to this Agreement; and
- (e) in case of any damage to any Allocated Asset, other than damage constituting an Event of Loss, at its election, in either case at its own expense, (i) repair such Allocated Asset so as to restore its utility consistent with the Operator's customary practice with respect to similar assets owned by the Operator (as determined solely by the Operator) or (ii) replace such Allocated Asset with an asset (which will become an Allocated Asset) having a fair market value (as determined solely by the Operator) equivalent to that of the damaged Allocated

Asset immediately prior to the damage (assuming, in either case, such Allocated Asset was then in the condition and state of repair required to be maintained by the terms of this Agreement), with such alterations and additions as may be made at the Operator's election pursuant to and subject to the conditions of Section 7.2 hereof; *provided, however*, that the Operator need not repair or replace any Allocated Asset to the extent that such Allocated Asset is not necessary to the operation of the Allocated Assets considered as a whole (as determined solely by the Operator), in which event the Operator shall credit to the Settlement Account the fair market value of such Allocated Asset as of the date immediately prior to the damage (assuming such Allocated Asset was then in the condition and state of repair required to be maintained by the terms of this Agreement). Upon the crediting of the Settlement Account with the fair market value of such Allocated Asset, such Allocated Asset shall no longer be subject to this Agreement and the Owner shall convey to the Operator or its designee, ownership of and title to such Allocated Asset. Notwithstanding the foregoing, until payment by the Operator to the Owner of the amount credited to the Settlement Account on the next succeeding Settlement Account Payment Date, such Allocated Asset shall be deemed to continue to be subject to this Agreement solely for the purpose of calculating the Operating Fee.

SECTION 7.2 Modification.

(a) The Operator shall at its expense make any Modification to any Allocated Asset required (i) by Applicable Law or in order to operate, maintain, service, store, or use such Allocated Asset in accordance with Applicable Law, as soon as practicable after any such requirement may arise or (ii) in order for the Operator to comply with the provisions of this Agreement (all such Modifications being referred to herein as "Required Modifications"); *provided*, that the Operator may, so long as no Event of Default shall have occurred and be continuing, in good faith by appropriate proceedings contest the validity or application of any Applicable Law in any reasonable manner which does not involve any reasonably foreseeable risk of the imposition of criminal liability on the Owner, or any material danger of any fine, penalty or other imposition upon the Owner for which the Operator has not acknowledged its obligation to indemnify the Owner pursuant to this Agreement. The Operator at its expense, from time to time, may make any Modification to any Allocated Asset that the Operator in its discretion may deem desirable in the proper conduct of the Operator's business (all such Modifications which are not Required Modifications being referred to herein as "Optional Modifications"); *provided* that any construction of new trackage or facilities appurtenant to but not located on such Allocated Assets shall, at Operator's election, be deemed not to be Modifications hereunder and not subject to this Agreement.

(b) Title to each Modification shall vest as follows:

(i) in the case of each (A) Required Modification or (B) other Nonseverable Modification, whether or not the Owner shall have financed or provided financing (in whole or in part) for such Modification, the Owner shall, without further act, effective on the

date such Modification shall have been incorporated into the modified Allocated Asset, acquire title to such Modification free and clear of all Liens other than Permitted Liens; or

(ii) in the case of each Severable Modification, the Operator shall retain title to such Modification and the Operator may (subject to Section 7.2(c) hereof) remove such Modification at its expense at any time so long as the modified Allocated Asset remains in or is restored by the Operator to the condition required by this Agreement.

Immediately upon title to a Modification vesting in the Owner pursuant to this Section 7.2(b), such Modification shall, without further act, become subject to this Agreement and be deemed part of the applicable Allocated Asset for all purposes.

(c) Subject to compliance with Applicable Law, the Operator may remove, at its expense, any Severable Modification; *provided*, that the Operator, at its expense shall repair any damage to the Allocated Asset from which a Severable Modification has been removed caused by such removal; *provided, further*, that in the event the Operator shall not have removed any Severable Modification to which the Operator shall have title as provided in Section 6.2(b)(ii) prior to the end of the Term, title to such Severable Modification shall vest in the Owner upon the expiration of such Term.

ARTICLE VIII

Obsolescence Termination: Abandonment

SECTION 8.1 Obsolescence Termination: Abandonment. Except as may otherwise be contemplated in this Agreement, the Operator may not dispose of, or otherwise convey or transfer any interest in the Allocated Assets to any Person. Unless an Event of Default shall have occurred and be continuing, if the Operator has determined that an Allocated Asset is uneconomic or surplus to, or no longer necessary for, the Operator's operating requirements as determined by the Operator in its sole judgment, the Operator shall have the right, with the Owner's consent, to terminate the application of this Agreement with respect to such Allocated Asset and, with the Owner's consent, to abandon or sell or otherwise dispose of such Allocated Asset (as agent for the Owner) in which event the Operator may retain the sale proceeds, if any, received for such Allocated Asset and shall credit to the Settlement Account the fair market value (as of the time of the abandonment, sale or other disposition) of such Allocated Asset (which, in no event, shall be less than the sale proceeds received for such Allocated Asset). Upon the crediting of the Settlement Account with the fair market value of such Allocated Asset, such Allocated Asset shall no longer be subject to this Agreement and the Owner shall convey to the Operator or its designee, ownership of and title to such Allocated Asset. Notwithstanding the foregoing, until payment by the Operator to the Owner of the amount credited to the Settlement Account on the next succeeding Settlement Account Payment Date, such Allocated Asset shall be deemed to continue to be subject to this Agreement solely for the purpose of calculating the Operating Fee.

SECTION 8.2 Conditions of Termination. As a condition to a termination, abandonment or other disposition pursuant to this Article VIII, any necessary Governmental Actions in connection therewith shall have been obtained by and at the expense of the Operator. Upon the Operator's request, the Owner shall cooperate fully with the Operator in seeking and obtaining all necessary Governmental Actions in connection with the termination or abandonment of any Allocated Asset.

ARTICLE IX

Termination

SECTION 9.1 Termination. (a) Unless the Operator exercises its renewal option under Article XVII, upon termination of this Agreement or return of any Reversion Asset pursuant to Section 2.3 hereof, the Operator shall, at its risk, cost and expense, cause the Allocated Assets subject to this Agreement at such time or the Reversion Assets to be (i) free and clear of all Liens other than Owner Liens, (ii) in compliance with the maintenance and operating provisions of this Agreement, and (iii) otherwise capable of being maintained, used and operated substantially in compliance with Applicable Law for the operation of a railroad appropriate to conditions existing at such time.

(b) Upon the termination of this Agreement or return of any Reversion Asset pursuant to Section 2.3 hereof, the Operator will, at the Operator's expense, promptly and duly execute and deliver to the Owner such documents and take such further actions as the Owner may reasonably request in order to effect the return of such Allocated Assets or Reversion Assets, including any Assigned Right, to the Owner or its designee.

SECTION 9.2 Owner Assignment, Lease or Sale of Allocated Asset. The Operator agrees that during the last year of the Term or any Renewal Term, it will cooperate in all reasonable respects with efforts of the Owner to lease, sell assign or otherwise transfer any Allocated Asset to any designee of the Owner.

SECTION 9.3 Governmental Approvals. The Operator shall cooperate and assist the Owner, at the expense of the Owner, in transferring or obtaining all Governmental Actions which may be necessary for the Owner or its designee, as the case may be, to operate, lease, purchase, assume or otherwise be a party to or beneficiary of any returned Allocated Asset and any Reversion Asset.

SECTION 9.4 Severable Modifications. At any time after the Operator has notified the Owner that it has determined not to renew this Agreement pursuant to Article XVII, or operational responsibility for the Allocated Assets or Reversion Assets reverts to the Owner, the Operator shall at the Owner's request, advise the Owner of the nature and condition of all Severable Modifications owned by the Operator pursuant to Section 7.2(b)(ii) hereof which the

Operator has removed or intends to remove from the Allocated Assets or Reversion Assets in accordance with Section 7.2(c) hereof. The Operator may (and shall, if so directed by Owner), at its sole cost, expense and risk, remove from any Allocated Asset or Reversion Asset any Severable Modification; *provided*, that any such Modification not removed pursuant to this Section 9.4 shall be deemed to be part of the Allocated Asset or Reversion Asset to which it relates for all purposes hereof and title to such Modification shall thereupon vest in the Owner free and clear of all Liens, other than Owner Liens.

ARTICLE X

Loss, Destruction, Condemnation, Damage, etc.

SECTION 10.1 Replacement; Payment.

(a) Upon the occurrence of an Event of Loss, or an event which with the passage of time would become an Event of Loss, with respect to any Allocated Asset, the Operator shall:

(i) replace the Allocated Asset which suffered the Event of Loss, with a replacement asset (which will become an Allocated Asset) which has a fair market value equivalent to that of the Allocated Asset which suffered the Event of Loss (as determined solely by the Operator) immediately prior to such Event of Loss (assuming such Allocated Asset was then in the condition and state of repair required by this Agreement); or

(ii) the Operator may retain the sale proceeds, if any, received for the Allocated Asset suffering the Event of Loss and shall credit to the Settlement Account the fair market value of such Allocated Asset immediately prior to such Event of Loss (assuming such Allocated Asset was then in the condition and state of repair required by this Agreement), which fair market value in no event shall be less than the sale proceeds received for such Allocated Asset. Upon the crediting of the Settlement Account with the fair market value of such Allocated Asset, such Allocated Asset shall no longer be subject to this Agreement and the Owner shall convey to the Operator or its designee, ownership of and title to such Allocated Asset. Notwithstanding the foregoing, until payment by the Operator to the Owner of the amount credited to the Settlement Account on the next succeeding Settlement Account Payment Date, the Allocated Asset suffering the Event of Loss shall be deemed to continue to be subject to this Agreement solely for the purpose of calculating the Operating Fee.

(b) Upon compliance by the Operator with Section 10.1(a)(i), (i) this Agreement shall continue with respect to any replacement Allocated Asset as though no Event of Loss had occurred, (ii) the Owner shall convey "as is" "where is", free and clear of all Owner Liens, without recourse or warranty (except as to the ability and authority of the Owner to transfer and convey such Allocated Asset free and clear of Owner Liens), to the Operator or its

designee all right, title and interest of the Owner in and to the Allocated Asset being replaced by executing and delivering to the Operator or its designee such bills of sales and other documents or instruments as the Operator or its designee may reasonably request to evidence such conveyance, and (iii) the Owner shall assign to the Operator all claims it may have against any other Person arising from the event which gave rise to the replacement.

(c) Upon compliance by the parties with Section 10.1(a)(ii), the Owner shall convey "as is" "where is", free and clear of all Owner Liens, without recourse or warranty (except as to the ability and authority of the Owner to transfer and convey such Allocated Asset free and clear of Owner Liens) to the Operator or its designee all right, title and interest of the Owner in and to such Allocated Asset by executing and delivering to the Operator or its designee such bills of sales and other documents or instruments as the Operator or its designee may reasonably request to evidence such conveyance.

SECTION 10.2 Applications During Event of Default. Any amount that shall be payable to the Operator pursuant to this Agreement arising out of any warranty, governmental award or otherwise received in respect of any Allocated Asset shall not be paid to the Operator or, if it shall have been previously paid to the Operator, shall not be retained by the Operator but shall be paid to the Owner, if at the time of such payment any Event of Default shall have occurred and be continuing. In such event, all such amounts shall be paid to and held by the Owner in trust as security for the obligations of the Operator to make payments under this Agreement or applied by the Owner toward payment of any of such obligations of the Operator at the time due hereunder. At such time as there shall not be continuing any Event of Default all such amounts at the time held by the Owner in excess of the amount, if any, that the Owner shall have elected to apply as above provided shall be paid to the Operator.

SECTION 10.3 Application of Article VII. Article VII shall not apply to any Allocated Asset after an Event of Loss has occurred with respect to such Allocated Asset; *provided*, that the foregoing shall not limit the obligations of the Operator under Article VII hereof with respect to any replacement Allocated Asset.

ARTICLE XI

Indemnities

SECTION 11.1 Indemnity by Operator. (a) The Operator assumes and shall be fully responsible for all liabilities attributable in any way to the Allocated Assets, or to operations on or over the Allocated Assets, except for (i) Retained Liabilities and any other liabilities with respect to which it is the responsibility of any Person other than the Operator under the terms of the Transaction Agreement and the Ancillary Agreements to indemnify the Owner, and (ii) liabilities that arise prior to the Closing Date referred to in Section 2.8(b)(ii) or Section 2.8(c) of the Transaction Agreement; *provided*, that for the purposes of this Section 11.1(a), the term

"Ancillary Agreements" as used in the parenthetical included in Sections 2.8(b) and 2.8(c) of the Transaction Agreement shall be deemed not to include this Agreement. To that end, the Operator agrees to and shall protect, indemnify and hold wholly harmless the Owner and its directors, officers, employees and agents (each an "Owner Indemnified Person") from and against any Damages arising from or attributable to the liabilities assumed by the Operator under the first sentence of this Section 11.1(a).

(b) Upon payment in full of any indemnity pursuant to this Section 11.1, the Operator shall, to the extent of such payment and so long as no Event of Default shall have occurred and be continuing, be subrogated to any rights of the Owner Indemnified Person in respect of the matter against which such indemnity was given (other than with respect to any insurance policies carried by such Owner Indemnified Person).

SECTION 11.2 Indemnity by Owner. (a) The Owner shall be fully responsible for all liabilities which arise prior to the Closing Date which are referred to in Section 2.8(b)(ii) or Section 2.8(c) of the Transaction Agreement. To that end, the Owner agrees to and shall protect, indemnify and hold wholly harmless the Operator and its directors, officers, employees and agents (each, an "Operator Indemnified Person") from and against any and all Damages arising from or attributable to (i) Retained Liabilities and any other liabilities with respect to which it is the responsibility of any Person other than the Operator under the terms of the Transaction Agreement and the Ancillary Agreements to indemnify the Owner, and (ii) liabilities that arise prior to the Closing Date referred to in Section 2.8(b)(ii) and Section 2.8(c) of the Transaction Agreement; *provided*, that for the purposes of this Section 11.2(a), the term "Ancillary Agreements" as used in the parenthetical included in Sections 2.8(b) and 2.8(c) of the Transaction Agreement shall be deemed not to include this Agreement.

(b) Upon payment in full of any indemnity pursuant to this Section 11.2, the Owner shall, to the extent of such payment, be subrogated to any rights of the Operator Indemnified Person in respect of the matter against which such indemnity was given (other than with respect to any insurance policies carried by such Operator Indemnified Person).

SECTION 11.3 Indemnification Procedures. (a) If any Action shall be threatened or instituted or any claim or demand shall be asserted against any Indemnified Party in respect of which indemnification may be sought under the provisions of this Agreement, the Indemnified Party shall promptly cause written notice of the assertion of any such claim, demand or Action of which it has knowledge to be forwarded to the Indemnifying Party. Such notice shall contain a reference to the provisions hereof or of such other agreement, instrument or certificate delivered pursuant hereto, in respect of which such claim is being made. The Indemnified Party's failure to give the Indemnifying Party prompt notice shall not preclude the Indemnified Party from obtaining indemnification from the Indemnifying Party under this Article XI unless the Indemnified Party's failure has materially prejudiced the Indemnifying Party's ability to defend the claim, demand or Action.

(b) If the Indemnified Party seeks indemnification from the Indemnifying Party as a result of a claim or demand being made by a third party (a "Third Party Claim"), the Indemnifying Party shall have the right promptly to assume the control of the defense of any Action with respect to such Third Party Claim, including, at its own expense, employment by it of counsel reasonably satisfactory to the Indemnified Party. The Indemnified Party may, in its sole discretion and at its own expense, employ counsel to represent it in the defense of the Third Party Claim, and in such event counsel for the Indemnifying Party shall cooperate with counsel for the Indemnified Party in such defense, provided that the Indemnifying Party shall direct and control the defense of such Third Party Claim or proceeding. The Indemnifying Party shall not consent to the entry of any judgment, except with the written consent of the Indemnified Party, and shall not enter into any settlement of such Third Party Claim without the written consent of the Indemnified Party which does not include as an unconditional term thereof the release of the Indemnified Party from all Liability in respect of such Third Party Claim.

ARTICLE XII

Assignments: Sub-Operating Agreements

SECTION 12.1 Operator Assignments. Except as otherwise provided in this Agreement, the Operator may not, without the prior written consent of the Owner, and subject to any applicable Governmental Actions, assign, transfer, sublease or otherwise grant the right to use any Allocated Asset or its interest therein or rights with respect thereto, including any Assigned Right.

SECTION 12.2 Merger, Consolidation, Etc. The Operator, without the consent of the Owner, may assign all or any part of its rights and obligations under this Agreement to (i) any of its controlled Subsidiaries or (ii) any successor in the event of a merger, consolidation, sale of all or substantially all its assets, liquidation or dissolution, if such assignee executes and delivers to the Owner an agreement reasonably satisfactory in form and substance to the Owner under which such assignee assumes and agrees to perform and discharge all the obligations and liabilities of the Operator; *provided* that any such assignment shall not relieve the Operator from the performance and discharge of such obligations and liabilities.

SECTION 12.3 Owner Assignments. The Owner shall not transfer or assign any part of its right, title and interest in this Agreement or any Allocated Assets used hereunder without the prior written consent of the Operator.

ARTICLE XIII

Inspection; Markings

SECTION 13.1 Rights to Information. The Owner may at its own expense, upon reasonable prior notice to the Operator during the normal business hours of the Operator, no more frequently than once in any calendar year, inspect the Allocated Assets and the books and records of the Operator relating to the maintenance and performance of such Allocated Assets and make copies and extracts therefrom, and may discuss such matters with the Operator's officers. Upon the occurrence and during the continuance of an Event of Default, the Owner may inspect such books and records at any time, which inspections shall be at the expense of the Operator. The Owner also shall have the right to obtain information regarding the condition and state of repair of any Allocated Asset, compliance by the Operator with Article VII hereof and the absence of an Event of Default.

SECTION 13.2 Markings. The Operator shall affix to certain Allocated Assets agreed to by the Operator and Owner identifying labels, plates or tags each setting forth such information as the Operator and Owner may agree. The Operator covenants and agrees to replace any such label, plate or tag which may be removed or destroyed or become illegible, and the Operator shall indemnify each Owner Indemnified Person against any liability, loss or expense incurred by such Owner Indemnified Person as a result of the failure to maintain such markings.

ARTICLE XIV

Events of Default

SECTION 14.1 Events of Default. Each of the following events shall constitute an Event of Default (whether any such event shall be voluntary or involuntary or come about or be effected by operation of law or pursuant to or in compliance with any judgment, decree or order of any court or any order, rule or regulation of any Governmental Authority):

(a) the Operator shall fail to make any payment of (i) the Operating Fee when due and such failure shall continue unremedied for a period of thirty (30) Business Days and (ii) any Supplemental Operating Fees due under this Agreement and such failure shall continue unremedied for a period of thirty (30) Business Days; or

(b) the Operator shall fail to perform or observe any other material covenant, condition or agreement to be performed or observed by it under this Agreement and such failure shall continue unremedied for a period of one hundred twenty (120) Business Days after notice thereof shall have been given to the Operator by the Owner; *provided*, that the continuation of any such failure or breach (other than a failure or breach curable by payment of money) for a period longer than such one hundred twenty (120) Business Day period shall not constitute an

Event of Default if (i) such default is curable but cannot be cured within such one hundred twenty (120) Business Day period and (ii) the Operator is diligently pursuing the cure of such default; *provided, further*, that any such failure or breach (other than a failure or breach curable by payment of money) shall constitute an Event of Default if such failure is not cured within the earlier of the last Business Day of the Term and four hundred fifty (450) days from the date notice thereof has been given to the Operator; or

(c) The Operator (i) shall commence a voluntary Insolvency Proceeding, (ii) shall seek the appointment of a trustee, receiver, liquidator, sequestrator, custodian or other similar official of the Operator or any substantial part of the Operator's property, (iii) shall acquiesce in or consent to any such relief or to the appointment of or taking possession by any such official in an involuntary Insolvency Proceeding commenced against it, (iv) shall make a general assignment for the benefit of creditors, or (v) shall fail generally to pay its undisputed debts as they become due; or

(d) an involuntary Insolvency Proceeding shall be commenced against the Operator seeking liquidation, reorganization or other relief with respect to such Person or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect or seeking the appointment of a trustee, receiver, liquidator, assignee, sequestrator, custodian or other similar official of it or any substantial part of its property, and such involuntary case or other proceeding shall remain undismissed or unstayed for a period of one hundred twenty (120) consecutive Business Days.

ARTICLE XV

Remedies

SECTION 15.1 Remedies. Upon the occurrence of any Event of Default and at any time thereafter so long as the same shall be continuing, the Owner may, at its option, declare by written notice to the Operator this Agreement to be in default; and at any time thereafter so long as such Event of Default shall not have been remedied, the Owner may do one or more of the following with respect to the Allocated Assets:

(a) sell the Allocated Assets at public or private sale, as the Owner may determine, or otherwise dispose of, hold, use, operate, lease to others or keep unused the Allocated Assets as the Owner, in its sole discretion, may determine, all free and clear of any rights of Operator;

(b) whether or not the Owner shall have exercised, or shall thereafter at any time exercise, any of its rights under paragraph (a) above, the Owner, by written notice to the Operator, may demand that the Operator pay to the Owner, and the Operator shall pay to the Owner, any accrued but unpaid Operating Fees (together with interest, if any, on such amount at

the Overdue Rate from such specified payment date until the date of actual payment of such amount);

(c) The Owner may terminate this Agreement and the rights of the Operator to use the Allocated Assets pursuant hereto.

The Owner may exercise one or more remedies in respect of certain Allocated Assets and one or more other remedies in respect of other Allocated Assets.

No termination of this Agreement, in whole or in part, or exercise of any remedy under this Article XV shall, except as specifically provided herein, relieve the Operator of any of its liabilities and obligations hereunder, all of which then outstanding shall survive such termination, repossession or exercise of remedy. In addition, the Operator shall be liable for any and all Fees and Expenses and other costs and expenses incurred by the Owner by reason of the occurrence of any Event of Default or the exercise of the remedies of the Owner with respect thereto. At any sale of any Allocated Assets or any part thereof pursuant to this Article XV, the Owner may bid for and purchase such property.

SECTION 15.2 Owner Rights. To the fullest extent permitted by Applicable Law, each and every right, power and remedy herein specifically given to the Owner or otherwise in this Agreement shall be cumulative and shall be in addition to every other right, power and remedy herein specifically given or now or hereafter existing at law, in equity or by statute, and each and every right, power and remedy whether specifically given herein or otherwise existing may be exercised from time to time and as often and in such order as may be deemed expedient by the Owner, and the exercise or the beginning of the exercise of any power or remedy shall not be construed to be a waiver of the right to exercise at the same time or thereafter any other right, power or remedy. No delay or omission by the Owner in the exercise of any right, power or remedy or in the pursuit of any remedy shall impair any such right, power or remedy or be construed to be a waiver of any default on the part of the Operator or to be an acquiescence therein. No express or implied waiver by the Owner of any Event of Default shall in any way be, or be construed to be, a waiver of any future or subsequent Event of Default.

SECTION 15.3 Exercise of Other Rights or Remedies. In addition to all rights and remedies provided in this Article XV, the Owner may exercise any other right or remedy that may be available to it under Applicable Law or proceed by appropriate court action to enforce the terms hereof or to recover damages for the breach hereof.

SECTION 15.4 Subject to Governmental Action. The exercise of any right or remedy provided for in this Article XV shall be subject to any applicable Governmental Action.

ARTICLE XVI

Right to Perform

SECTION 16.1 Right to Perform. If the Owner shall fail to make any payment or perform under, or comply with, any contract, lease, license or other agreement in respect of the Allocated Assets to which the Owner is a party, the Operator may (but shall have no duty to do so) make such payment or perform or comply with such agreement, and the Operating Fee shall be reduced in the amount of such payment and the amount of all expenses of the Operator (including Fees and Expenses) incurred in connection with such payment or the performance of or compliance with such agreement.

ARTICLE XVII

Renewal Options

SECTION 17.1 Renewal Notice.

(a) The Operator shall have the option to renew this Agreement twice. Not less than one (1) year before expiration of the Term or the initial Renewal Term, the Operator may deliver to the Owner a notice (the "Renewal Notice") of the Operator's election to renew this Agreement in respect of all, but not less than all, Allocated Assets for a renewal period of ten (10) years (or, if there has already been a renewal period, an additional renewal period of ten (10) years), or such other period of time as the Owner and the Operator shall mutually agree (each such period, a "Renewal Term").

(b) All terms of this Agreement shall continue in full force and effect during each such Renewal Term.

(c) In the event the Operator elects to renew this Agreement, the Renewal Term will commence on the day immediately following the expiration of the Term or initial Renewal Term and continue until the end of such Renewal Term.

(d) The Renewal Notice, once given, shall be irrevocable and the option to renew this Agreement shall expire if the Operator does not deliver the Renewal Notice by the times provided in Section 17.1(a) hereof.

(e) Notwithstanding the foregoing, the Operator shall have no right to renew this Agreement if any Event of Default exists on the date of delivery of the Renewal Notice or the commencement of the Renewal Term.

ARTICLE XVIII

Certain Notices and Information

SECTION 18.1 Notice of Event of Default. Promptly after an executive officer of the Operator shall have actual knowledge of the occurrence or existence of any Event of Default or any event which, with the passing of time or giving of notice, would constitute an Event of Default, the Operator shall so notify the Owner and set forth in reasonable detail the circumstances surrounding such event or Event of Default and shall specify what actions the Operator has taken or intends to take to cure such event or Event of Default.

SECTION 18.2 Information Regarding Allocated Assets. The Operator shall promptly furnish the information at such times and in such format as is regularly produced by the Operator concerning the condition, maintenance and use of the Allocated Assets as the Owner may reasonably request.

ARTICLE XIX

Confidentiality

SECTION 19.1 Confidentiality. The parties hereto shall hold, and shall cause their respective officers, employees, agents, consultants and advisors to hold, in strict confidence, unless compelled to disclose by judicial or administrative process or, in the opinion of its independent legal counsel, by other requirements of law, all information furnished it by the other party hereto, or their respective representatives, pursuant to this Agreement (except to the extent that such information can be shown to have been (i) available to such Person on a non-confidential basis prior to its disclosure by the other Person, (ii) in the public domain through no fault of such Person or (iii) later lawfully acquired from other sources by the Person to which it was furnished), and no Person shall release or disclose such information to any other Person, except its auditors, attorneys, financial advisors, bankers and other consultants and advisors who shall be bound by the provisions of this Section 19.1. In the event that a subpoena, discovery or other request that arguably calls for production or disclosure of such confidential information is received, the Person receiving such request must promptly notify in writing the Person whose information has been requested. The Person receiving such request shall provide the Person whose confidential information has been requested, a reasonable opportunity to review such information and to assert any rights it may have with respect to the potential disclosure of such confidential information. Each party shall be deemed to have satisfied its obligation to hold confidential information concerning or supplied by the other party hereto, if it exercises the same care as it takes to preserve confidentiality for its own similar information.

ARTICLE XX

Miscellaneous

SECTION 20.1 Dispute Resolution. Except as otherwise specifically provided for herein, any dispute, controversy or claim (or any failure by the parties to agree on a matter as to which this Agreement expressly or implicitly contemplates subsequent agreement by the parties, except for matters left to the sole discretion of a party) arising out of or relating to this Agreement, or the breach, termination or validity hereof or thereof, shall be settled in accordance with the provision of Section 11.12 of the Transaction Agreement.

SECTION 20.2 Documentary Conventions. This Agreement shall be governed by, and construed in accordance with, all the Documentary Conventions.

IN WITNESS WHEREOF, intending to be legally bound, the parties hereto have each caused this Operating Agreement to be duly executed as of the date first above written.

PENNSYLVANIA LINES LLC,
as OWNER

By: _____
Name: _____
Title: _____

NORFOLK SOUTHERN RAILWAY COMPANY,
as OPERATOR

By: _____
Name: _____
Title: _____

SCHEDULE I
to Operating Agreement

ADDRESSES AND PAYMENT INFORMATION

Owner

Pennsylvania Lines LLC

Operator

Norfolk Southern Railway Company
Three Commercial Place
Norfolk, Virginia 23510
Telecopy number: 757-629-[]
Attention: [Name]

DEFINITIONS AND RULES OF USAGE

Rules of Usage

The terms defined below shall have the respective meanings set forth below for all purposes, and such meanings shall be equally applicable to both the singular and plural forms of the terms defined. "Include", "includes" and "including" shall be deemed to be followed by "without limitation" whether or not they are in fact followed by such words or words of like import. "Writing", "written" and comparable terms refer to printing, typing, lithography and other means of reproducing words in a visible form. Any instrument or Applicable Law defined or referred to below or in any instrument that recites it is to be construed in accordance with this Appendix means such instrument or Applicable Law as from time to time amended, modified or supplemented, including (in the case of instruments) by waiver or consent and (in the case of Applicable Laws) by succession of comparable successor Applicable Laws and includes (in the case of instruments) references to all attachments thereto and instruments incorporated therein; *provided*, that any reference to the Bankruptcy Code shall mean the Bankruptcy Code as in effect on the date of reference thereto and applicable to the relevant case. References to any Person are, unless the context otherwise requires, also to its successors and assigns. "Hereof", "herein", "hereunder" and comparable terms refer to the entire instrument in which such terms are used and not to any particular article, section or other subdivision thereof or attachment thereto. References to any gender include, unless the context otherwise requires, references to all genders, and references to the singular include, unless the context otherwise requires, references to the plural and vice versa. "Shall" and "will" have equal force and effect. References in an instrument to "Article", "Section" or another subdivision or to an attachment are, unless the context otherwise requires, to an article, section or subdivision of or an attachment to such instrument.

Definitions

"**Action**" shall mean any action, claim, suit, arbitration, inquiry, subpoena, discovery request, proceeding or investigation by or before any Governmental Authority or forum or authority having jurisdiction over the matter involving or related to any Owner Indemnified Person, any Operator Indemnified Person or the Allocated Assets.

"**Affiliate**" means, with respect to a specified Person, any Person that directly or indirectly controls, is controlled by or is under common control with, the specified Person or any trust for the benefit of such Person or any entities controlled by such Person; *provided* that (a) NYC shall not be an Affiliate of CSX and its Subsidiaries or NSC and its Subsidiaries, (b) PRR shall not be an Affiliate of NSC and its Subsidiaries or CSX and its Subsidiaries and (c) CSX and NSC and their respective Subsidiaries shall not be Affiliates of CRR or CRR Parent and their respective Subsidiaries and vice versa.

"**Agreement**" means the Operating Agreement, dated as of the Closing Date, between the Owner and the Operator.

"Allocated Asset:" means the assets identified in or pursuant to the Transaction Agreement as the PRR Allocated Assets other than, as of the Reversion Date, the Reversion Assets.

"Applicable Law" means, with respect to any Person or to any Allocated Asset, all laws, ordinances, judgments, decrees, injunctions, writs and orders of any Governmental Authority and any Governmental Actions applicable to or having jurisdiction over such Person or Allocated Asset.

"Appraisal Procedure" means a procedure whereby an independent third-party appraiser jointly by the Owner and the Operator determines the Fair Market Rental Value of the Allocated Assets or confirms the reasonableness of the fair market value of the Allocated Assets credited to the Settlement Account. The fees and expenses of the appraiser shall be divided equally between the Owner and the Operator.

"arises prior" means that the circumstances giving rise to the liability have transpired prior to the applicable date, whether or not such liability has been discovered, asserted or accrued prior to such date. If the circumstances giving rise to a liability bridge the Closing Date, the parties will apportion it to pre-Closing Date and post-Closing Date periods, with disagreement being subject to the dispute resolution provisions of Section 20.1 of the Agreement.

"Assigned Rights" means Contracts and rights included in the Allocated Assets.

"Bankruptcy Code" means the United States Bankruptcy Code of 1978, as amended from time to time, and the rules and regulations promulgated thereunder.

"Business Day" means any day other than a Saturday, Sunday or other day on which banks are authorized or required to be closed in New York, New York and Richmond, Virginia.

"Closing Date" is the date of this Agreement.

"Contracts" means any contract, lease, loan agreement, deed, easement, license, reversion, mortgage, security agreement, trust indenture or other agreement or instrument to which the Owner is a party or by which it is bound or to which any of the Allocated Assets is subject.

"Contractual Obligation" means, with respect to any Person, any provision of any security issued by such Person or of any Contract to which such Person is a party or by which it or any of its property is bound.

"CRC" means Consolidated Rail Corporation, a Pennsylvania corporation.

"CRR" means Conrail Inc., a Pennsylvania corporation.

"CSX" means CSX Corporation, a Virginia corporation.

"CSXT" means CSX Transportation, Inc., a Virginia corporation.

"Documentary Conventions" means, with respect to an instrument that states in substance that it is governed thereby, that, except as otherwise expressly provided therein:

(a) Documentary Convention—Survival. The representations, warranties and agreements of the parties contained or provided for in such instrument and the parties' obligations under any and all thereof shall survive the execution and delivery of such instrument and the expiration or other termination of the Agreement and shall be and continue in effect notwithstanding the fact that any party may waive compliance with any other term, provision or condition of the Agreement.

(b) Documentary Convention—Governing Law. Such instrument shall become effective upon delivery and shall in all respects be governed by, and construed in accordance with, the laws (excluding principles of conflict of laws) of the Commonwealth of Virginia applicable to agreements made and to be performed entirely within such state, including all matters of construction, validity and performance.

(c) Documentary Convention—Counterparts. Except as otherwise specifically provided in the Agreement, such instrument may be executed by the parties thereto in separate counterparts, each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute but one and the same instrument. To make proof of such instrument, it shall only be necessary to produce one such counterpart executed by each party thereto. All signatures need not be on the same counterpart.

(d) Documentary Convention—Method of Payment. All amounts required to be paid by any party to such instrument to any other party, either thereunder or under the Agreement shall be paid in such immediately available and freely transferable Dollars as at the time of payment shall be legal tender for the payment of public and private debts, by wire transfer, or other method of payment acceptable to the payee, of immediately available funds to the account of the payee set forth in Schedule I to the Agreement or to such other account located in the U.S. as such payee may specify by notice to the other parties.

(e) Documentary Convention—Parties in Interest; Limitation on Rights of Others. The terms of such instrument shall be binding upon, and inure to the benefit of, the parties thereto and their permitted successors and assigns. Nothing in such instrument shall be construed to give any Person (other than the parties thereto and their permitted successors and assigns and as expressly provided therein) any legal or equitable right, remedy or claim under or in respect of such instrument or any covenants, conditions or provisions contained therein.

(f) Documentary Convention—Table of Contents; Headings. The table of contents, if any, and headings, if any, of the various articles, sections and other subdivisions of such instrument are for convenience of reference only and shall not modify, define or limit any of the terms or provisions of such instrument. To the extent of any inconsistency between the headings and any text, such text shall govern.

(g) Documentary Convention—Entire Agreement; Amendment and Waiver.

The Agreement, the other Ancillary Agreements and the Transaction Agreement constitute the entire agreement of the parties thereto with respect to the subject matter thereof and supersede all prior written and oral agreements and understandings with respect to such subject matter. Neither the Agreement nor any of the terms hereof may be terminated, amended, supplemented, waived or modified orally, but only by an instrument in writing signed by the party against which the enforcement of the termination, amendment, supplement, waiver or modification shall be sought and subject to any other limitations on amendments set forth in the Agreement, the other Ancillary Agreements and the Transaction Agreement. Any amendment, modification or supplement to the Agreement shall be subject to any applicable Governmental Action. No failure or delay of any party in exercising any power or right under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any such right or power, or any abandonment or discontinuance of steps to enforce such a right or power, preclude any other or further exercise thereof or the exercise of any other right or power.

(h) Documentary Convention—Severability.

Any provision of such instrument that shall be prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions thereof and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction. To the extent permitted by Applicable Law, the parties to such instrument waive any provision of law that renders any provision thereof prohibited or unenforceable in any respect.

(i) Documentary Convention—Notices.

All notices, consents, directions, approvals, instructions, requests and other communications required or permitted by the terms of such instrument to be given to any Person shall be in writing, and any such notice shall become effective five (5) Business Days after being deposited in the mails, certified or registered, with appropriate postage prepaid for first class mail or, if delivered by hand or courier service or in the form of a telecopy, when received, and shall be directed to the address or telecopy number of such Person set forth in Schedule I to the Agreement. From time to time any party to such instrument may designate a new address or telecopy number for purposes of notice thereunder by notice to each of the other parties thereto, effective when received.

(j) Documentary Convention—Payment on Business Days.

If any payment under such instrument is required to be made on a day other than a Business Day, the date of payment shall be extended to the next Business Day without any additional interest for such extension period so long as payment is made on such Business Day.

"Dollars" or "\$" means dollars in the lawful currency of the United States of America..

"Event of Default" has the meaning set forth in Section 14.1 of the Agreement.

"Event of Loss" means, with respect to any Allocated Asset, the occurrence of any of the following events: (a) the loss or theft of such Allocated Asset to the extent that such Allocated Asset is not recovered within one hundred eighty (180) days of such event or, if earlier, the expiration of the Term, (b) the destruction of or damage to such Allocated Asset or any part thereof to such extent as shall render repair of such Allocated Asset uneconomical to the Operator or unfit or unsuitable for its intended use, which destruction or damage is an actual or constructive total loss, (c) the requisition of use of such Allocated Asset for an indefinite period or for a stated period in excess of one hundred eighty (180) days or, if earlier, which ends later than the expiration of the Term by any Governmental Authority under power of eminent domain or otherwise, (d) the condemnation, confiscation, seizure or requisition of title to such Allocated Asset by a Governmental Authority, (e) any damage to such Allocated Asset which results in an insurance settlement on the basis of an actual or constructive total loss, (f) the prohibition by Applicable Law of the use of such Allocated Asset by the Operator or any other Person for a period of one hundred eighty (180) consecutive days from the date of such prohibition or, if earlier, the end of the Term. The date of occurrence of an Event of Loss in respect of any Allocated Asset shall be deemed to be, (1) in the event of damage to such item, the date of such damage, (2) in the event of a condemnation or requisition of title by a Governmental Authority, the date thereof, and (3) in the event of an Event of Loss under clause (a), (c) or (f) of the first sentence of this definition, the date of expiration of the period referred to in said clause.

"Excluded Taxes" has the meaning set forth in Section 3.5 of the Agreement.

"Fair Market Rental Value" means, as to the Allocated Assets, the fair market rental value that would be obtained in an arm's length transaction between an informed and willing lessee and an informed and willing lessor, in either case under no compulsion to lease, for the lease of the Allocated Assets, disregarding the fact (if applicable) that the Allocated Assets are subject to the Agreement and assuming that Article VII of the Agreement shall have been complied with in all respects. Subject to the foregoing, the Fair Market Rental Value as to the Allocated Assets shall be such value determined in accordance with the Appraisal Procedure.

"Fees and Expenses" means, with respect to any Person in connection with any transaction or occurrence, the reasonable fees and expenses of its legal counsel for such transaction or occurrence.

"Governmental Action" means all authorizations, consents, approvals, waivers, exceptions, variances, franchises, permissions, permits and licenses of, and filings and declarations with, Governmental Authorities.

"Governmental Authority" means any federal, state, municipal, county, local or foreign governmental Person, authority or agency, court, regulatory commission, stock exchange or other similar body.

"Income Tax Regulations" means the regulations promulgated by the U.S. Department of the Treasury pursuant to the Code.

"Indemnifying Party" means a Person who requires or requests indemnification under Article XI of the Agreement.

"Indemnified Party" means any Owner Indemnified Person or Operator Indemnified Person.

"Insolvency Proceeding" means any case or proceeding under bankruptcy, insolvency, reorganization, receivership, moratorium or other laws providing relief to debtors.

"Lien" means any lien, mortgage, encumbrance, pledge, charge, lease, easement, servitude or security interest or any interests similar to the foregoing, including those existing under any conditional sales or other title retention agreement or the filing of or agreement to deliver any financing statement under the UCC.

"Modification" means, with respect to any Allocated Asset, any modification, alteration, addition, upgrade or improvement to such Allocated Asset.

"Nonseverable Modification" means any Required Modification and any Modification which is not readily removable without impairing the fair market value, residual value, condition, remaining useful life or utility of the Allocated Asset to which such Modification relates immediately prior to such Modification.

"NSC" means Norfolk Southern Corporation, a Virginia corporation.

"NSR" means Norfolk Southern Railway Company, a Virginia corporation.

"NYC" means New York Central Lines LLC, a Delaware limited liability company.

"Obsolescence Termination Payment" has the meaning set forth in Section 8.2 of the Agreement.

"Operating Fee" means the operating fee agreed to from time to time by the Owner and Operator based on the Fair Market Rental Value of the Allocated Assets as set forth in a supplement to this Agreement.

"Operator" means NSR or any permitted successor or assign.

"Operator Indemnified Person" has the meaning set forth in Section 11.2 of the Agreement.

"Optional Modification" has the meaning set forth in Section 7.2(a) of the Agreement.

"Organic Document" means, with respect to any Person, as applicable, the certificate or articles of incorporation, partnership agreement, limited liability company agreement, certificate of

formation, membership agreement, by-laws and all other organizational documents of such Person.

"Overdue Rate" means the rate equal to the lesser of (i) the prime rate set forth in *The Wall Street Journal* and (ii) the maximum rate allowed by Applicable Law.

"Owner" means PRR, a Delaware limited liability company.

"Owner Indemnified Person" has the meaning set forth in Section 11.1 of the Agreement.

"Owner Lien" means a Lien (i) which results from acts of, or any failure to act by, or as a result of claims against, the Owner, (ii) in favor of any taxing authority by reason of the non-payment by the Owner, or (iii) which results from acts of, or any failure to act by, the Owner in violation of its obligations under the Agreement.

"Payment Date" means each March 31, June 30, September 30 and December 31 or, if such day is not a Business Day, the next succeeding Business Day.

"Permitted Liens" means, with respect to any Allocated Asset,

(a) The respective rights and interests of the Operator and Owner under the Agreement,

(b) Owner Liens,

(c) Liens for Taxes which are not yet due or so long as no Event of Default shall have occurred and be continuing are being contested in good faith by appropriate proceedings which suspend the collection thereof; *provided*, that such proceedings shall not involve any material danger of the sale, forfeiture or loss of such Allocated Asset or any part thereof or interest therein or the reasonably foreseeable risk of imposition of any criminal liability on the Owner or any other material liability not indemnified against by the Operator,

(d) Liens of mechanics, materialmen, laborers, employees or suppliers and similar Liens arising by operation of law, in each case incurred by the Operator in the ordinary course of business for sums that are not overdue for more than sixty (60) days or so long as no Event of Default shall have occurred and be continuing are being contested in good faith by negotiations or by appropriate proceedings which suspend the collection thereof; *provided*, that such contest does not involve any material danger of the sale, forfeiture or loss of such Allocated Asset or any part thereof or interest therein or the reasonably foreseeable risk of imposition of any criminal liability on the Owner or any other material liability not indemnified against by the Operator,

(e) Liens arising out of any judgments or awards against the Operator with respect to which (i) at the time an appeal or proceeding for review is being prosecuted in good faith, (ii) there shall have been secured a stay of execution pending such appeal or proceeding for

review, (iii) during such proceeding there is not, and such proceeding does not involve, any material danger of the sale, forfeiture or loss of such Allocated Asset or any part thereof or any interest therein or the risk of imposition of any criminal liability on the Owner or any other liability not indemnified against by the Operator, and (iv) if such Liens have specifically attached to any Allocated Asset, the Operator has provided the Owner with security reasonably satisfactory to the Owner, in the amount of such claims,

(f) Liens, rights of way, easements and other rights to use the Allocated Assets (including licenses for private crossings) common in the railroad industry arising out of the ordinary course of business of the Operator,

(g) the rights and interests of any permitted Qualified Sub-Operator, and

(h) Liens consented to by the Owner.

"Person" shall mean any individual, corporation, partnership, limited liability company, joint venture, association, joint-stock company, trust, unincorporated organization, government or any agency or political subdivision thereof or any other entity.

"PRR" means Pennsylvania Lines LLC, a Delaware limited liability company.

"Renewal Notice" has the meaning set forth in Section 17.1(a) of the Agreement.

"Renewal Operating Fee" has the meaning set forth in Section 17.1(b) of the Agreement.

"Renewal Term" has the meaning set forth in Section 17.1(a) of the Agreement.

"Required Modification" has the meaning set forth in Section 7.2(a) of the Agreement.

"Reversion Assets" has the meaning set forth in Section 2.3 of the Agreement.

"Reversion Date" has the meaning set forth in Section 2.3 of the Agreement.

"Reversion Notice" has the meaning set forth in Section 2.3 of the Agreement.

"Settlement Account" has the meaning set forth in Section 6.1 of the Agreement.

"Settlement Account Payment Date" has the meaning set forth in Section 6.2 of the Agreement.

"Severable Modification" means any Modification which is not a Nonseverable Modification.

"Sub-Operating Agreement" has the meaning set forth in Section 12.1(a) of the Agreement.

"Substantial Allocated Asset" means (i) an Allocated Asset with a fair market value in excess of \$10 million or (ii) a group of Allocated Assets that (a) are sold, transferred or otherwise disposed of during any calendar year to the same Person (including Affiliates of such Person) or the same group of Persons (including Affiliates of such Persons) and (b) have an aggregate fair market value in excess of \$10 million.

"Supplemental Operating Fees" means all amounts payable by the Operator pursuant to the terms of the Agreement, including indemnities payable by the Operator pursuant to Section 11.1 hereof, other than the Operating Fee.

"Tax" means all taxes (including income, franchise, excise, real and personal property, sales, use, payroll and withholding and other taxes) imposed by any federal, state, local, foreign or international taxing authority or Governmental Authority, whether in the form of assessments, levies, imposts, duties, charges, assessments, withholdings or otherwise, now existing or hereafter created or adopted, together with all interest, penalties and additions imposed with respect to such amounts.

"Term" means the period commencing on the Closing Date and terminating on the 25th anniversary thereof.

"Termination Date" means the date on which the Term terminates.

"Third Party Claim" has the meaning set forth in Section 11.3(b) of the Agreement.

"Third Party Provider" has the meaning set forth in Section 4.2(a) of the Agreement.

"Transaction Agreement" means the Transaction agreement among CSX, CSXT, NSC, NSR, CRC, CRR and CRR Holdings LLC dated as of June 10, 1997.

"UCC" means the Uniform Commercial Code as enacted and in effect from time to time in any applicable jurisdiction.

"Valuation Date" means: (i) the Closing Date, (ii) the sixth (6th), twelfth (12th), eighteenth (18th), and twenty-fourth (24th) anniversaries of the Closing Date, (iii) the first day of each Renewal Term; (iv) the sixth (6th) anniversary of the first day of each Renewal Term, (v) a Settlement Account Payment Date (if not already a Valuation Date pursuant to other clauses of this definition), and (vi) such other dates as the parties hereto may agree.

MARTHA A. WOMACKS

QUITCLAIM DEED 188750 AUG 10 8

SUBJECT: THE TRANSFER OF EASEMENTS

THIS QUITCLAIM DEED, made as of the 1st day of June, 1999, between CONSOLIDATED RAIL CORPORATION, a Pennsylvania corporation, whose mailing address is Two Commerce Square, 2001 Market Street (18-B), P.O. Box 41419, Philadelphia, PA 19101-1419, hereinafter called "Grantor", and NEW YORK CENTRAL LINES LLC, a Delaware Limited Liability Company, whose tax and mailing address is 500 Water Street (J-910), Jacksonville, FL 32202, hereinafter called "Grantee", WITNESSETH THAT:

(Wherever used herein, the terms "Grantor" and "Grantee" may be construed in the singular or plural as the context may require or admit, and for purposes of exceptions, reservations and/or covenants, shall include the successors and assigns of each.)

WHEREAS, as part of a plan of corporate reorganization, Grantor has created Grantee as its wholly owned subsidiary; and

WHEREAS, as part of that plan of reorganization, Grantor has agreed to a tax free contribution to the capital assets of Grantee of certain real estate interests, including lines of railroad thereon, in several states within the United States and certain provinces in the Dominion of Canada;

NOW THEREFORE, for and in consideration of the premises above, pursuant to the authority given by the board of directors of said Grantor, Grantor does hereby GRANT, RELEASE, REMISE and QUITCLAIM, unto Grantee, all right, title and interest of Grantor whatsoever in and to certain portions of Grantor's railroad rights-of-way and real property, operating or nonoperating and regardless of width, including any Permanent Easement for rail carriage, railroad use or purpose, located within twenty (20) Segment(s) in the County of Marion, Indiana, and consisting of 106.17 miles of right-of-way, and 2,091.21 acres, more or less, and three parcels of land totaling 1.23 acres, more or less, collectively containing 2,092.44 acres, more or less, designated "the Premises";

ALL as generally shown on Exhibit A, and more particularly described on Exhibit B, with Beginning and Ending Points of each Segment shown on Exhibits B-1 through B-39, all of which are attached hereto and incorporated herein;

NOTE: Reduced prints of each Valuation Section Map referenced herein are attached hereto and incorporated herein as collective Exhibit C; print reduction may alter any scale stated on such Maps.

TOGETHER WITH: (a) all buildings, structures, fixtures and improvements on the Premises, in "as is, where is" condition, including but not limited to all tracks, rails, ties, ballast, grading, switches, crossings, bridges, trestles, supports, culverts, signals, crossing diamonds and protection devices, radio antennae, communication lines, poles and facilities, loading platforms, depots, and any other associated structures, that are affixed as of the date of this deed to the Premises, (b) all strips and gores, (c) all and singular the rights, alleys, ways, waters, minerals and mineral rights, timber and timber rights, air rights, hereditaments, franchises, privileges, advantages and appurtenances to the same belonging or in anyway incident or appertaining, including any items, rights or interests retained, excepted or reserved in any post-acquisition conveyances (other than reserved herein), (d) all reversions, remainders, rents, issues and profits thereof, (e) any easements for support or retention rights in streets, waterways or adjacent lands, (f) any rights to

IN, MARION CO.

RECORDED BY MARION COUNTY CLERK
Inst # 1999-0151430
JUN 31 1999 PAGES: 183

cross any river, stream, creek or other body of water within the Premises, or to cross or lay tracks in any streets adjacent to or connecting parcels herein conveyed, (g) all right, title and interest of Grantor, or any predecessor of Grantor in the Premises, created and/or held by the hostile, actual, visible, exclusive and notorious occupation of any portion thereof for a continuous period of twenty-one (21) years or more prior to the date of this Deed, (h) all connected and/or contiguous sidetracks, spur tracks, lead tracks and yards, and facilities thereon, and (i) all contracts, leases, licenses, agreements, and all rights in and third party easements or occupations in, on, under, over or along the Premises;

ALSO TOGETHER WITH all financial and property rights under that (those) Fiber Optic Agreement(s) between Grantor and WorldCom Fiber Optic Company, dated October 20, 1986 (CRC Agreement No 287 717);

EXCEPTING AND RESERVING unto Grantor all financial and property rights under that (those) Fiber Optic Agreement(s) between Grantor and AT&T Fiber Optic Company, Dated January 1, 1984 (CRC Agreement No. 267 666), between Grantor and Qwest Fiber Optic Company, dated November 1, 1996 (CRC Agreement No. 311 630), between Grantor and Sprint, Dated August 10, 1984 (CRC Agreement No. 270 407) and between Grantor and WorldCom, Dated October 1, 1984 (CRC Agreement No. 272 257);

It being the intent of this Deed to include all right, title and interest held by Grantor in and to any lands and improvements within said County, between said Beginning Point and said Ending Point, whether in any recorded or unrecorded deeds (other than identified in Exhibit B);

TO HAVE AND TO HOLD the Premises, all mentioned and described herein, and the appurtenances thereto, and all the estate, right, title, lien, interest and claim whatsoever of Grantor therein, either in law or equity (other than Reserved herein), UNTO the proper use, benefit and enjoyment of Grantee, Grantee's successors and assigns, forever including the continuation of operation of a line of railroad thereon;

SUBJECT TO: (A) reservations, exceptions, easements, covenants, restrictions and limitations of record or platted affecting the same; (B) any existing rail crossings, public utilities and roadways; (C) any, pipes, wires, poles, cables, conduit, culverts, drainage courses or systems (and appurtenances) now in, on, under, over or across the same (and any contracted rights to retain, same); (D) any streams, rivers, creeks or other navigable waterways passing under or across the same; and (E) any agreements for location and use of fiber optic cable, conduit and related facilities in, on or along a portion of the Premises (the "Fiber Optic Agreement(s)").

THIS INSTRUMENT is executed and delivered by Grantor, and accepted by Grantee, subject to the covenants set forth herein, which shall be deemed part of the consideration of this conveyance and shall be in lieu of any rights, rule, law, custom or statute of the State of Indiana now or hereafter in force with respect to any covenants. Grantor, however, does warrant and covenant to assign or convey to Grantee any right, title or interest in and to the Premises acquired by Grantor after the date of this Deed.

Grantor hereby declares that this conveyance is deemed not subject to Indiana Gross Income Tax under IC Section 6-2-1-1-2(c) and not subject to transfer tax under Indiana Tax Regulation Rule 45 IAC 1-1-22, because it is a deed from a parent corporation to its subsidiary for no consideration other than a contribution to capital and issuance of stock therein.

IN, MARION CO.

IN WITNESS WHEREOF, CONSOLIDATED RAIL CORPORATION, pursuant to due corporate authority, has caused its name to be signed hereto by its officer(s) hereunto duly authorized and its corporate seal, duly attested, to be hereunto affixed.

Signed, sealed and delivered
in the presence of: —

(1) [Signature]
Print Name: Michael J. Gilligan

(2) [Signature]
Print Name: Allan J. Baer

CONSOLIDATED RAIL
CORPORATION

By: [Signature]
Print Name: Robert W. Ryan
Print Title: Director - Real Estate

Attest [Signature] (SEAL)
Assistant Corporate Secretary
Print Name: James D. McGeehan

COMMONWEALTH OF PENNSYLVANIA)
COUNTY OF PHILADELPHIA) SS.

Before me, ELIZABETH C GALLAGHER, a Notary Public of the Commonwealth of Pennsylvania and the County of Philadelphia, on the date below, in said County, Robert W. Ryan and James D. McGeehan, both (☒) to me known and/or (☐) proven by satisfactory current evidence to be the person(s) whose name(s) is/are subscribed to the above instrument as Director - Real Estate and Assistant Corporate Secretary respectively, who, being by me first duly sworn, did each acknowledge and say that effective as of June 1, 1999: she/he is Director - Real Estate of CONSOLIDATED RAIL CORPORATION, the corporation described in and which executed said instrument; she/he is fully informed of the contents of the instrument; she/he knows the seal of said corporation; the seal affixed to said instrument is such seal; it was so affixed by authority of the Board of Directors of said corporation; each signed his/her name thereto voluntarily and freely for said corporation, pursuant to Board authority; and said instrument is the voluntary and free act and deed of said corporation, as a capital transfer or conveyance of the property and/or assets of the Grantor herein to its subsidiary.

GIVEN under my hand and official notarial seal, this 18th day of May, 1999.

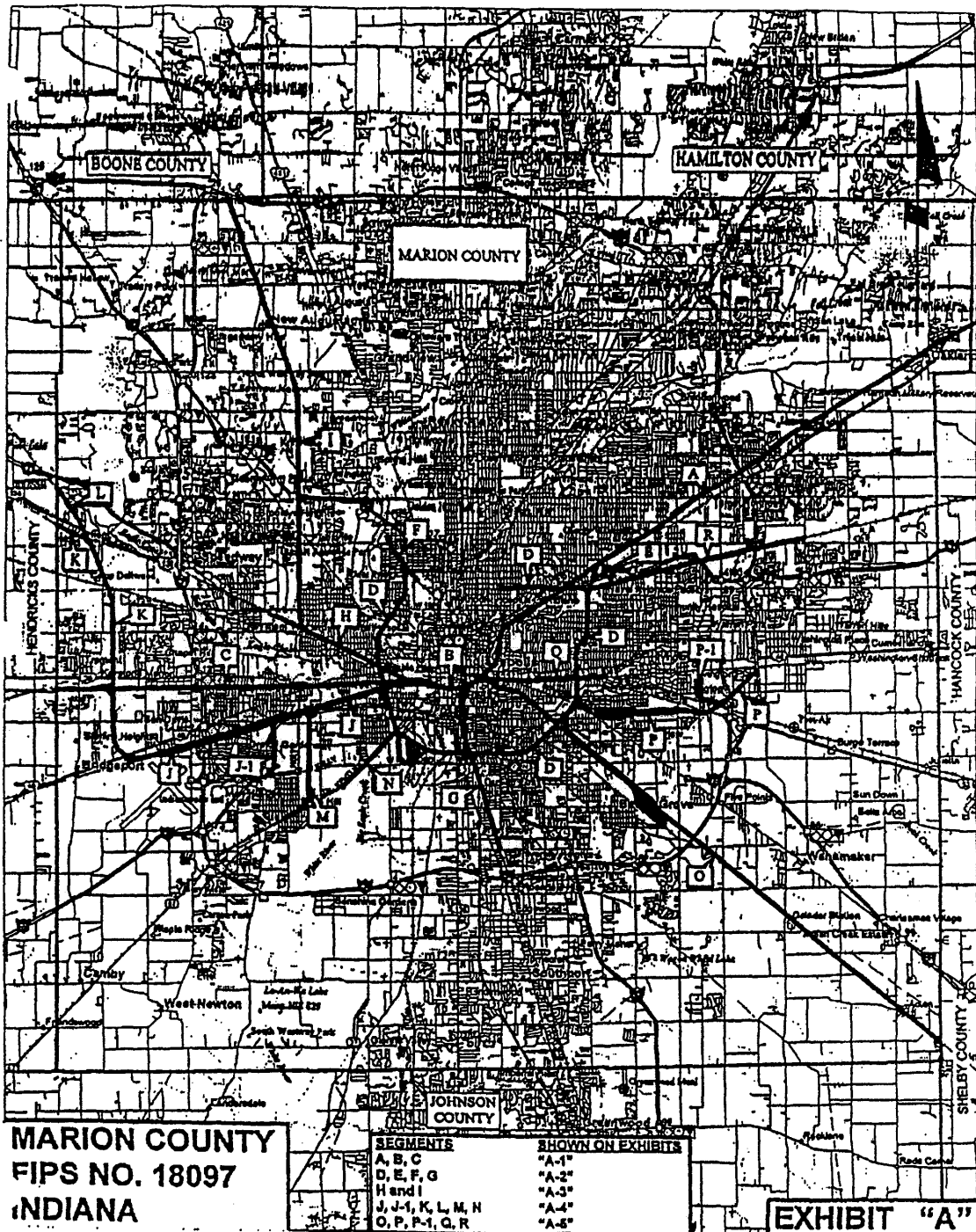
NOTARIAL SEAL
ELIZABETH C. GALLAGHER, Notary Public
City of Philadelphia, Phila. County
My Commission Expires May 31, 1999

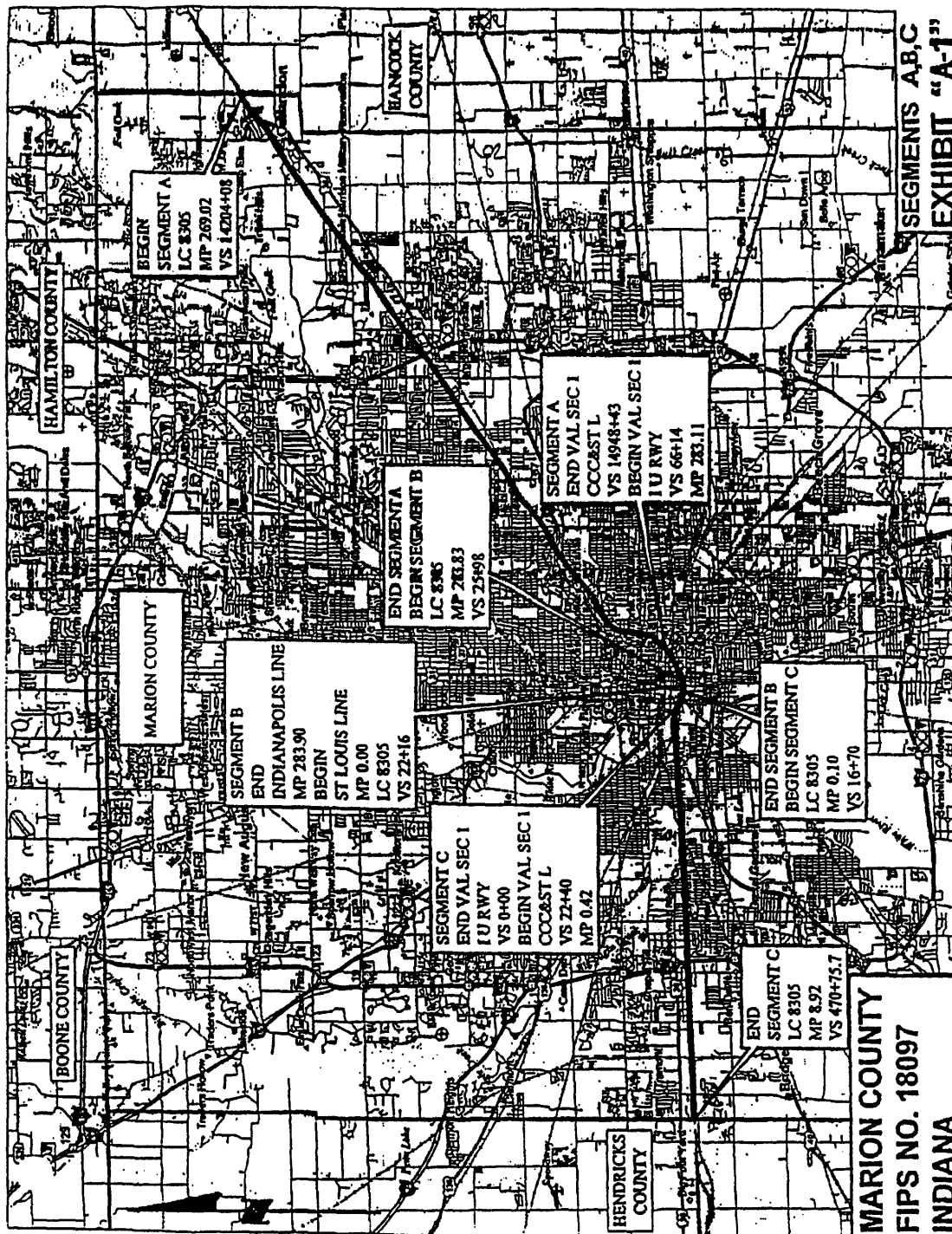
[Signature] (SEAL)
Notary Public ELIZABETH C GALLAGHER
Print Name:
My commission:

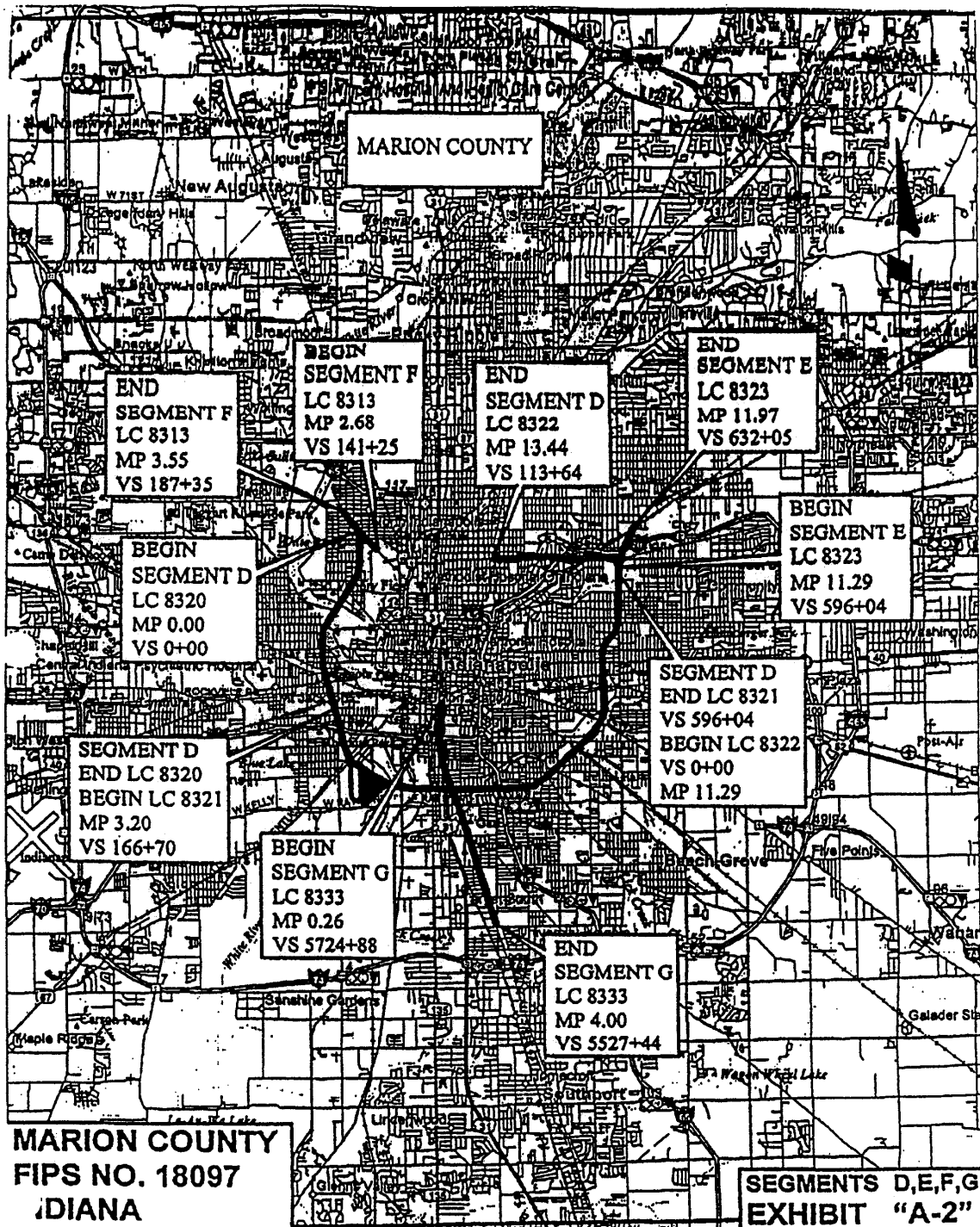
This instrument prepared by
or under the direction of:
Richard Clinton Keene,
Attorney for Grantee
Business Address:
800-C Third Street
Neptune Beach, Florida 32266
Phone: (904) 247-1600
Fax: (904) 247-1696

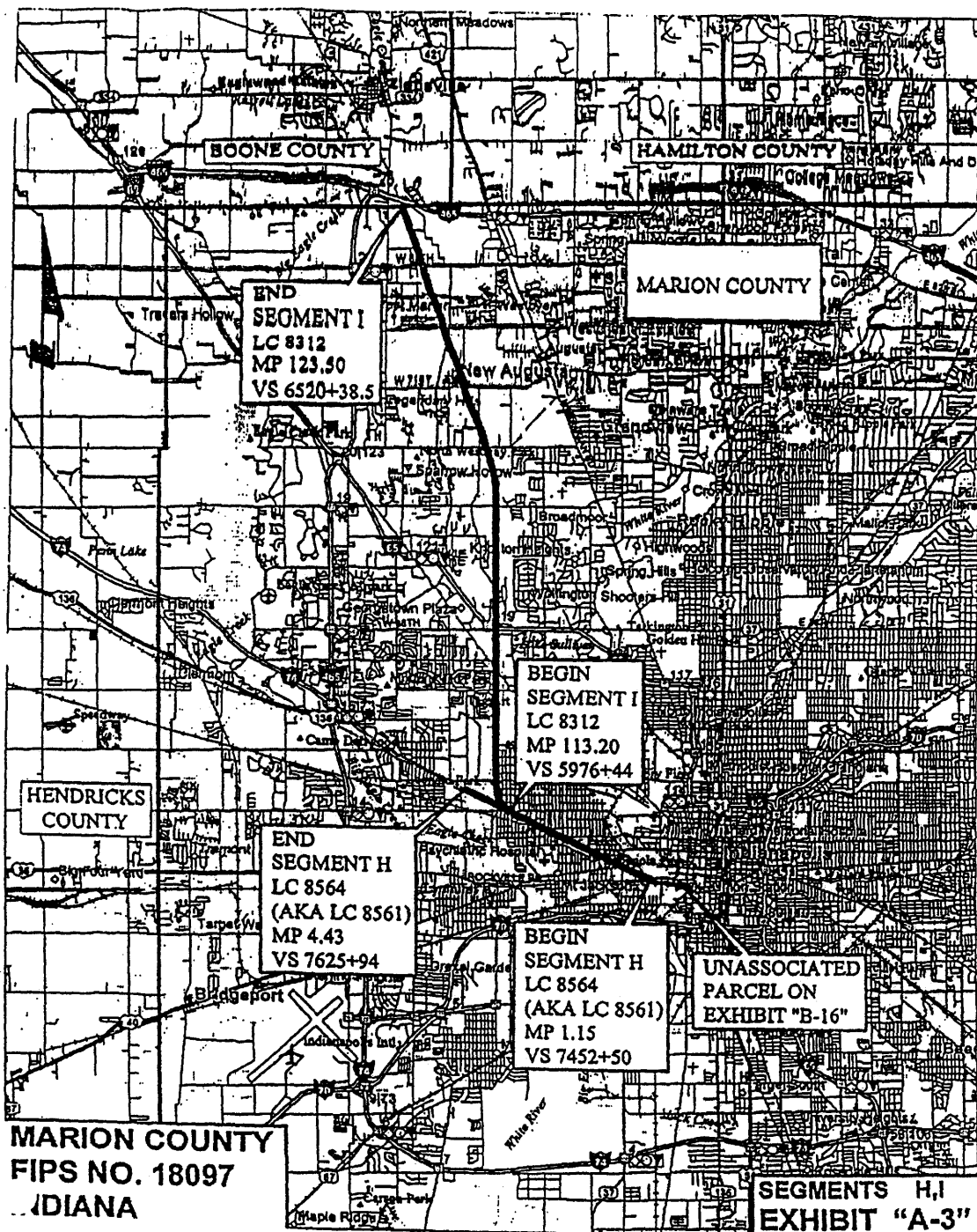
IN, MARION CO.

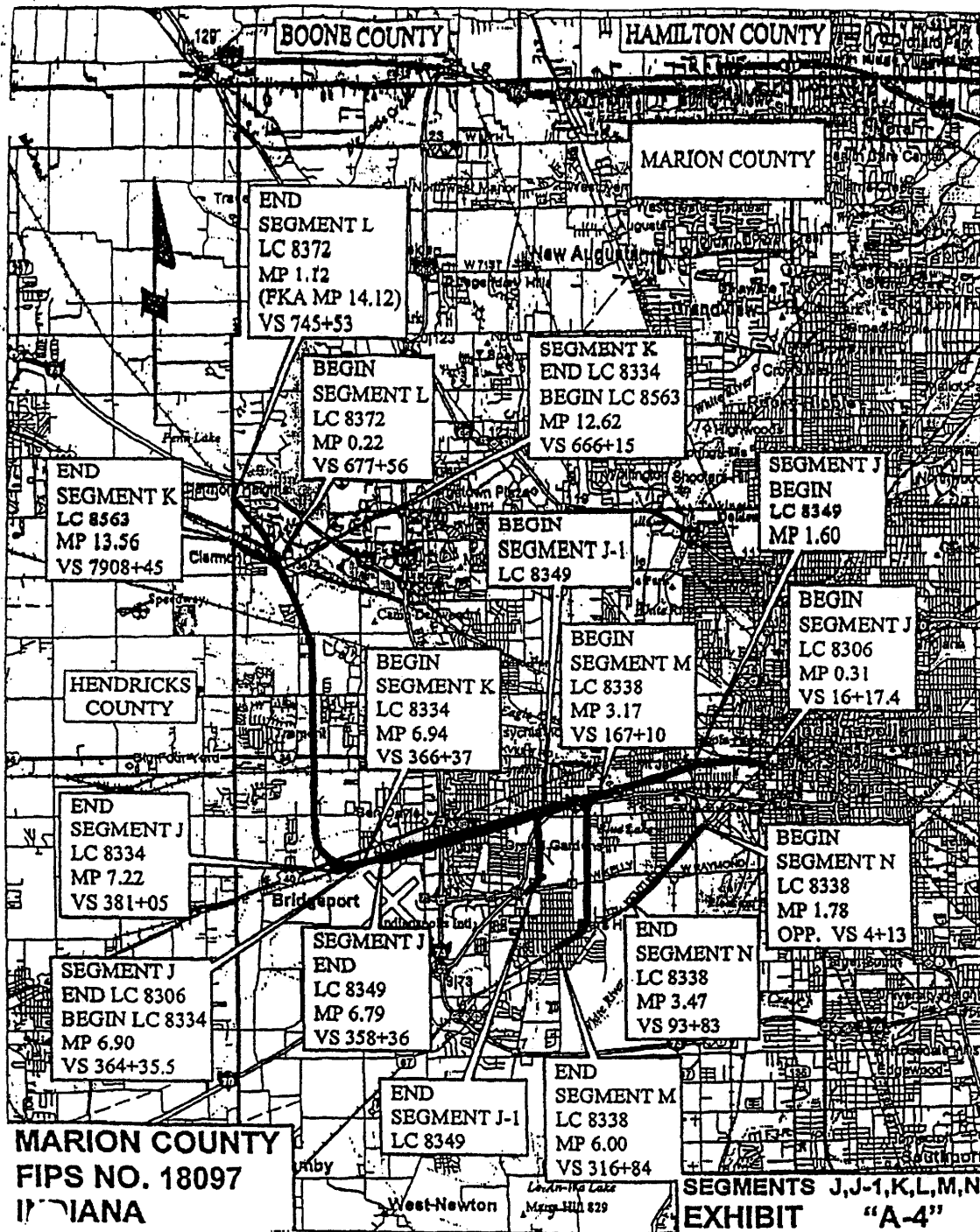
RETURN RECORDED DEED TO GRANTEE:
c/o CSX Transportation, Inc.
ATTN: Real Estate Department
500 Water Street, S/C J-915
Jacksonville, FL 32202











CONFIRMATORY QUITCLAIM DEED

This instrument prepared by
or under the direction of:
Richard Clinton Keene,
Attorney for Grantee
Business Address:
800-C Third Street
Neptune Beach, Florida 32266
Phone: (904) 247-1600
Fax: (904) 247-1696

Tax Reference(s):
(N.J.S.A. 46:15 - 2.1; N.J.S.A. 46:16-3)
or ☐ No property tax identification
number(s) is/are available on the date
of this Deed; Exempt per N.J.S.A. 46:15-8.

RETURN RECORDED DEED TO GRANTEE:
c/o CSX Transportation, Inc.
ATTN: Real Estate Department
500 Water Street, S/C J-915
Jacksonville, FL 32202

THIS QUITCLAIM DEED, made as of the 1st day of June, 1999, between CONSOLIDATED RAIL CORPORATION, a Pennsylvania corporation, whose mailing address is Two Commerce Square, 2001 Market Street (19-B), P.O. Box 41419, Philadelphia, PA 19101-1419, hereinafter called "Grantor", and NEW YORK CENTRAL LINES LLC, a Delaware Limited Liability Company, whose tax and mailing address is 500 Water Street (J-910), Jacksonville, FL 32202, hereinafter called "Grantee", WITNESSETH:

(Wherever used herein, the terms "Grantor" and "Grantee" may be construed in the singular or plural as the context may require or admit, and for purposes of exceptions, reservations and/or covenants, shall include the successors and assigns of each.)

WHEREAS, as part of a plan of corporate reorganization, Grantor has created Grantee as its wholly owned subsidiary; and

WHEREAS, as part of that plan of reorganization, Grantor has agreed to a tax free contribution to the capital assets of Grantee of certain real estate interests, including lines of railroad thereon, in several states within the United States and certain provinces in the Dominion of Canada;

This Quitclaim Deed confirms the conveyance of a portion of a line of railroad located in and constructed in more than one county and previously recorded with the New Jersey Secretary of State.

NOW THEREFORE, pursuant to the authority given by its board of directors, for and in consideration of the premises above, Grantor does by these presents RELEASE, REMISE and forever QUITCLAIM unto Grantee, all right, title and interest of Grantor in and to certain portions of Grantor's railroad rights-of-way and real property, operating and nonoperating and regardless of

width, including any permanent easement for rail carriage, railroad use or purpose, located within three (3) Segment(s) in the County of Hudson, New Jersey, and consisting of 6.93 miles of right-of-way, and 263.72 acres, more or less, and two parcels of land containing 10.52 acres, more or less, collectively containing 274.24 acres, more or less, herein designated "the Premises";

ALL as generally shown on Exhibit A, and more particularly described on Exhibit B, with Beginning and Ending Points of each Segment shown on Exhibits B-1 through B-9, all of which are attached hereto and incorporated herein;

NOTE: Reduced prints of each Valuation Section Map referenced herein are attached hereto and incorporated herein as collective Exhibit C; print reduction may alter any scale stated on such Maps.

TOGETHER WITH: (a) all buildings, structures, fixtures and improvements on the Premises, in "as is, where is" condition, including but not limited to all tracks, rails, ties, ballast, grading, switches, crossings, bridges, trestles, supports, culverts, signals, crossing diamonds and protection devices, radio antennae, communication lines, poles and facilities, loading platforms, depots, and any other associated structures, that are affixed as of the date of this deed to the Premises, (b) all strips and gores, (c) all and singular the rights, alleys, ways, waters, minerals and mineral rights, timber and timber rights, air rights, hereditaments, franchises, privileges, advantages and appurtenances to the same belonging or in anyway incident or appertaining, including any items, rights or interests retained, excepted or reserved in any post-acquisition conveyances (other than reserved herein), (d) all reversions, remainders, rents, issues and profits thereof, (e) any easements for support or retention rights in streets, waterways or adjacent lands, (f) any rights to cross any river, stream, creek or other body of water within the Premises, or to cross or lay tracks in any streets adjacent to or connecting parcels herein conveyed, (g) all right, title and interest of Grantor, or any predecessor of Grantor in the Premises, created and/or held by the hostile, actual, visible, exclusive and notorious occupation of any portion thereof for a continuous period of twenty-one (21) years or more prior to the date of this Deed, (h) all connected and/or contiguous sidetracks, spur tracks, lead tracks and yards, and facilities thereon, and (i) all contracts, leases, licenses, agreements, and all rights in and third party easements or occupations in, on, under, over or along the Premises;

It being the intent of this Deed to include all right, title and interest held by Grantor in and to any lands and improvements within said County, between said Beginning Point and said Ending Point, whether in any recorded or unrecorded deeds (other than identified in Exhibit B);

RESERVING unto Grantor all right, title and interest in the Fiber Optic Agreement(s) mentioned below, including the right to collect all rents, profits, issues and fees therefrom, and the right(s), if any, to effect any renewals thereof, and rights in said renewals, and other rights and protections thereunder; AND EXCEPTING unto Grantor a nonexclusive easement to keep those existing fiber optic facilities in effect, and, under said Agreement(s), to install, construct, operate, repair, renew, replace therein, and remove therefrom, such fiber optic communication facilities (cable, wire, associated electronics, conduit, repeaters, terminals, shelters, connection boxes, power supplies, etc., as defined in said Agreement(s)), and the right of access thereto; PROVIDED THAT such easement and rights shall be exercised in a manner which does not interfere with the railroad operations or safety of Grantee, or Grantee's right to grant other such nonexclusive easements or licenses within the Premises;

TO HAVE AND TO HOLD the Premises, all mentioned and described herein and intended to

NJ, HUDSON CO CONFIRMATORY

be quitclaimed herein, and the appurtenances thereto, and all the estate, right, title, lien, interest and claim whatsoever of Grantor therein, either in law or equity, (other than Reserved herein), UNTO the proper use, benefit and behoof of Grantee, Grantee's successors and assigns, forever, including the continuation of operation of a line of railroad thereon.

SUBJECT TO: (A) reservations, exceptions, easements, covenants, restrictions and limitations of record or platted affecting the same; (B) any existing rail crossings, public utilities and roadways; (C) any, pipes, wires, poles, cables, conduit, culverts, drainage courses or systems (and appurtenances) now in, on, under, over or across the same (and any contracted rights to retain, same); (D) any streams, rivers, creeks or other navigable waterways passing under or across the same; and (E) any agreements for location and use of fiber optic cable, conduit and related facilities in, on or along a portion of the Premises (the "Fiber Optic Agreement(s)").

THIS INSTRUMENT is executed and delivered by Grantor, and accepted by Grantee, subject to the covenants set forth herein, which shall be deemed part of the consideration of this conveyance and shall be in lieu of any rights, rule, law, custom or statute of the State of New Jersey, now or hereafter in force with respect to any covenants. Grantor, however, does warrant and covenant to assign or convey to Grantee any right, title or interest in and to the Premises acquired by Grantor after the date of this Deed.

Grantor hereby declares that this conveyance is deemed not subject to State or County excise taxes because it is a deed from a parent corporation to its subsidiary for no consideration other than a contribution to capital and issuance of stock therein. However the undersigned officer of Grantor certifies, in accordance with Section 46:15 - 5, New Jersey Statutes, that the full and actual value of all land or property hereby conveyed, or of all property rights herein quitclaimed and released, within the County described above, including any property exchange and/or financing, is \$0.00.

IN WITNESS WHEREOF, CONSOLIDATED RAIL CORPORATION, pursuant to due corporate authority, has caused its name to be signed hereto and on its behalf by its officer(s) hereunto duly authorized, and its corporate seal, duly attested, to be hereunto affixed.

Signed, sealed and delivered
in the presence of:

(1) [Signature]
Print Name: Michael K. Gligan

(2) [Signature]
Print Name: Allan J. Baer

CONSOLIDATED RAIL
CORPORATION

By: [Signature]
Print Name: Robert W. Ryan
Print Title: Director - Real Estate

Attest [Signature] (SEAL)
Assistant Corporate Secretary
Print Name: James D. McGeehan

COMMONWEALTH OF PENNSYLVANIA)
) SS.

COUNTY OF PHILADELPHIA

Before me, ROBERT B. D'ZURO, a Notary Public of the Commonwealth of Pennsylvania and the County of Philadelphia, on the date below, in said County, came Robert W. Ryan, and James D. McGeehan, both (X) to me known and/or () satisfactorily proven by sufficient current evidence to be the person(s) whose name(s) is/are subscribed to the above instrument as Director - Real Estate and Assistant Corporate Secretary respectively, who, being by me first duly sworn, did each acknowledge and say that effective as of June 1, 1999: she/he is/are the aforesaid designated officer(s) of CONSOLIDATED RAIL CORPORATION, the corporation described in and which executed said instrument; she/he is fully informed of the contents of the instrument; she/he knows the seal of said corporation; the seal affixed to said instrument is such seal; it was so affixed by authority of the Board of Directors of said corporation; each signed his/her name thereto voluntarily and freely for said corporation, pursuant to proper Board resolution; and said instrument is the voluntary and free act and deed of said corporation, as a capital transfer or conveyance of the property and/or assets of the Grantor herein to its subsidiary.

GIVEN under my hand and official notarial seal, this 18 day of May, 1999.

Robert B. D'Zuro (SEAL)
Notary Public
Print Name: ROBERT B. D'ZURO
My commission:

NOTARIAL SEAL
ROBERT B. D'ZURO, Notary Public
City of Philadelphia, Phila. County
My Commission Expires Sept. 18, 2000

NJ, HUDSON CO CONFIRMATORY

CONRAIL



May 7, 1998

Clifton E. Marshall
Contract Manager
AT&T Network Supplier Management
Promenade II, Room 09E45
1200 Peachtree Street
Atlanta, GA 30309

Via Fax and U.S. Mail

Re: Fiber Optic License Agreement -- Renewal Negotiations

Dear Mr. Marshall:

At our April 23 meeting regarding the captioned matter, we agreed that we would exchange drafts of the proposed changes that each party is seeking in these renewal negotiations. While Conrail orally outlined the proposed changes it seeks to make in the renewal license agreement at the meeting (as did AT&T), including Sections 11.3 and 11.4 (title defense indemnification), you advised me in a telephone call last week that AT&T was not prepared to discuss any changes to those sections. Although Conrail is not abandoning its desire to revise Sections 11.3 and 11.4, at least on a prospective basis, it is nevertheless prepared to proceed with the renewal negotiations in order to ascertain the scope and magnitude of the changes sought by AT&T.

The additional changes sought by Conrail are as follows:

1. Revise Section 7.2 of the License Agreement so as to eliminate Conrail responsibility for paying "the reasonable and necessary expenses of restoring" AT&T's fiber optic cable system to "full and continuing operation" when Conrail's negligence causes "an interruption in service over, or damage to," said AT&T fiber optic system. A draft of revised Section 7.2 is enclosed. In addition, current Section 7.3 should be deleted and Sections 7.4 and 7.5 renumbered accordingly.
2. Add new Section 7.5, which makes explicit what has been implicit and reflected in the course of dealing between the parties regarding the relocation of AT&T fiber optic cable due to the construction of railroad facilities. A draft of that provision is enclosed. This provision would be subject to the governmental reimbursement agreement entered into between Conrail and AT&T, which I believe is going to be referenced or incorporated into the renewal license agreement.

3. Delete Section 11.2 of the License Agreement, the "most favored nation" provision.

The foregoing matters represent the changes sought by Conrail in these renewal negotiations. Once we receive and review the changes proposed by AT&T, I believe we should meet and discuss the changes sought by both parties.

Very truly yours,



Gary L. Pfeiffer

Enclosure

cc: Joseph Noffsinger
Cary Dickieson, Esq.
Richard Mehley, Esq.